Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Insecticide, Fungicide, and Rodenticide Act preempts a state law claim that a manufacturer's labeling of its pesticide in full compliance with Environmental Protection Agency regulations was an unconscionable commercial practice.

2. Whether the First Amendment prohibits a state law claim that a manufacturer committed an unconscionable commercial practice by (a) distributing a truthful magazine article on a subject of public importance and (b) accurately reporting to responsible government officials the unlawful use of the manufacturer's products.

RULE 14.1(b) STATEMENT

The following are the parties to the proceeding in the Minnesota Supreme Court:

1. Ronald Peterson
2. Barry Thune
3. Owen Larson
4. Owen Larson Farms, Inc.
5. Duane Evenson
6. Jeffrey Nesvig
7. Richard Moen
8. Christopher Grove
9. Christopher Grove Farms, Inc.
10. David Abentroth
11. Glenn Asbeck
12. Asbeck, Inc.
13. Donald Steinbeisser
14. Joe G. Steinbeisser & Sons, Inc.
15. Stephen Pust
16. Stephen Pust Farms, Inc.
17. All persons who purchased the herbicide Poast between January 1, 1992, and December 31, 1996, for use on their crops, except North Dakota residents who purchased Poast in North Dakota
18. BASF Corporation

RULE 29.6 STATEMENT

BASF Corporation is a wholly-owned subsidiary of BASF Americas Corporation. BASF Americas Corporation is a wholly-owned subsidiary of BASFIN Corporation, which, in turn, is a wholly-owned subsidiary of BASF Aktiengesellschaft. BASF Corporation, BASF Americas Corporation and BASFIN Corporation are not publicly held. The stock of BASF Aktiengesellschaft is traded publicly in Germany and other countries outside the United States, and its American Depository Receipts are listed on the New York Stock Exchange for trading in the United States.

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PETITION FOR A WRIT OF CERTIORARI

BASF Corporation (BASF) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Minnesota in this case.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court (App., *infra*, 1a-27a) is reported at 675 N.W.2d 57. The opinion of the Minnesota Court of Appeals (App., *infra*, 28a-56a) is reported at 657 N.W.2d 853.

JURISDICTION

The opinion of the Minnesota Supreme Court was issued on February 19, 2004, and final judgment was entered on June 10, 2004. App., *infra*, 76a-77a. Justice Thomas extended the time for filing a petition for writ of certiorari until July 18, 2004. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The constitutional, statutory and regulatory provisions involved are set forth in the Appendix. App., *infra*, 78a-82a.

STATEMENT

In this nationwide class action under the New Jersey Consumer Fraud Act (NJCFA), the Minnesota Supreme Court upheld a $52 million judgment on a claim arising from BASF's federally-approved labeling of pesticides it manufactures. Respondents contended that BASF committed an "unconscionable commercial practice" violating state law (N.J. Stat. Ann. § 56:8-2) by putting different names and labels on two pesticides having the same active ingredient, and by labeling and marketing the less-expensive pesticide for only a subset of the uses approved by the Environmental Protection Agency (EPA). Although respondents conceded that BASF's

labeling practices were expressly authorized by federal law, they contended that BASF improperly used federal law to "segment the market" (Tr. 3548) for its two products. To further support their claim that BASF had behaved in an "unconscionable" manner (*id.*), plaintiffs relied heavily on BASF's sponsorship of an accurate magazine article informing readers that off-label use of pesticides is illegal and its truthful reports to state regulatory authorities of information leading to the prosecution of some farmers and dealers for off-label pesticide use. The judgment was affirmed after the appellate courts rejected BASF's arguments that the action was barred by federal preemption and that the First Amendment precluded plaintiffs from relying on evidence of BASF's protected speech.

*1. **Regulatory Background.*** The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*, is a "comprehensive regulatory statute" that governs the labeling, sale, and use of pesticides (including herbicides). *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 601 (1991) (quoting *Ruckelshaus* v. *Monsanto*, 467 U.S. 986, 991 (1984)). A pesticide may not be distributed or used in the United States unless it has been registered by EPA. 7 U.S.C. § 136a(a). Under FIFRA, any state may refuse to allow the sale or use of EPA-registered pesticides within its borders. *Id.* § 136v(a). Exercising the authority reserved to them under FIFRA, all 50 states require separate state registration of pesticides. See, *e.g.*, Tr. 2661-2662.

EPA has exclusive authority over pesticide labeling. FIFRA expressly provides that a state "shall not impose or continue in effect any requirements for labeling * * * in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b). Congress intended this provision "to completely preempt State authority in regard to labeling." H.R. Rep. No. 92-511, at 16 (1971). EPA may not register a pesticide unless it determines that its labeling "compl[ies] with [FIFRA's] requirements." 7 U.S.C. § 136a(c)(5)(B).

EPA has promulgated detailed specifications for pesticide labeling. 40 C.F.R. § 156.10(a)(1). Under these rules, pesticides having the same active ingredient must be labeled as distinct products if the chemical formulas differ to a specified degree. 40 C.F.R. §§ 152.43, 158.175. The labeling must specify the authorized uses of the product. 7 U.S.C. §§ 136(q)(1)(A), 136j(a)(1)(F). FIFRA prohibits the use of any pesticide "in a manner inconsistent with its labeling." *Id.* § 136j(a)(2)(G). Promotion of "off-label" pesticide use also is unlawful. See *id.* § 136j(a)(1)(B).

EPA's "subset labeling" rule permits a manufacturer to omit EPA-authorized uses from product labeling. See 40 C.F.R. § 152.130(b) ("[a] registrant may distribute or sell a product under labeling bearing any subset of the approved directions for use"). When it promulgated this rule, EPA explained:

> A company having a registered product is permitted * * * to market the product in a variety of ways. The product may be marketed under different brand names, each product bearing the full set of uses approved by the Agency. Or it may be marketed under the same brand name, but bearing different subsets of approved uses (for example, to distinguish primary uses for different regions of the country). Or each product may bear both a different brand name and a different subset of approved uses.

53 Fed. Reg. 15952, 15957 (May 4, 1988). If a manufacturer employs subset labeling, the pesticide may lawfully be used *only* for the purposes listed on the labeling. 7 U.S.C. § 136j(a)(2)(G). If a manufacturer wishes to sell a pesticide in a state that has not registered the product for all of its EPA-authorized uses, subset labeling is mandatory.

2. Factual Background. "Major crops," or "high acreage crops," such as soybeans, corn, and cotton, are farmed on millions of acres but provide farmers with a relatively low

financial return per acre. "Minor crops," or "high value crops," which include dozens of widely varied crops such as sugar beets, vegetables, grapes, citrus fruit and berries, are farmed on far fewer acres, but yield higher profits per acre. Tr. 3283. Because of higher development, testing and registration costs, lower sales volumes, and higher liability risks, many pesticide manufacturers have been reluctant to sell pesticides for the minor crop market, and many minor crop farmers have had difficulty finding pesticides that meet their needs. Tr. 878-879, 1406, 1421, 1787-1788, 2123-2124, 2582, 3336; D. Exs. 353, 356, 362, 493, 515, 629, 630.

In 1983, petitioner BASF first registered its pesticide "Poast," a herbicide, with EPA for use on major crops only. Responding to requests from farmers, BASF subsequently undertook to make Poast available for minor crops. *Id.* See also P. Ex. 234. After conducting extensive additional crop safety testing (Tr. 895-896, 903), BASF applied for and received federal and state registration to label and sell Poast for use on a broad range of minor crops. By 1992, Poast was registered and labeled nationwide for use on over 60 crops, including most minor crops. D. Ex. 694.

BASF developed another herbicide, called "Poast Plus," to address problems that arose when Poast reacted antagonistically with agricultural chemicals commonly used on soybeans. Tr. 892-893. Poast Plus has the same active ingredient as Poast (sethoxydym), but it also contains a newly-invented, patented adjuvant that solves the chemical antagonism problem. Tr. 2736-2743. In 1989, BASF registered Poast Plus with EPA. Because of its differences from Poast, EPA rules *required* BASF to register Poast Plus as a separate product having a different name. See 40 C.F.R. §§ 152.15, 152.43, 158.175; EPA, Label Review Manual (3d. ed.), Ch. 12: Labeling Claims, at Part IV.C (hereinafter "Label Review Manual"). Initially, BASF registered Poast Plus with EPA for use on soybeans and three other major crops. In 1992, using the same residue data that it had used to seek expanded EPA reg-

istration of Poast, BASF registered Poast Plus with EPA for use on a broad range of minor crops. See App., *infra*, 4a.

BASF was not ready to market Poast Plus for minor crops, however. Although BASF had performed thousands of crop-safety tests before marketing Poast for minor crops, it had not as fully tested Poast Plus on those crops. D. Ex. 1160; Tr. 3006.[1] Furthermore, the early testing revealed that Poast Plus was biologically more active ("hotter") than Poast and thus presented a greater risk of crop damage, without any offsetting performance benefits for minor crops. Tr. 922. Finally, BASF's tank-mix testing – which EPA does not require but BASF uses to assess the real-world performance of its products – showed that Poast Plus became riskier when mixed with other chemicals commonly used on minor crops. Tr. 2921-2922. BASF scientists insisted on more testing before the company sold Poast Plus for use on minor crops. Tr. 2923, 2946. Accordingly, BASF did not register Poast Plus for minor crops in any state,[2] and it did not list minor crops on the final product labeling.

Initially, BASF sold Poast Plus for about the same price as Poast. Tr. 3385. In the early 1990s, competition in the major-crop pesticide market led BASF to lower the price of Poast Plus. Tr. 3386-3387. Between 1992 and 1996, Poast Plus cost less than Poast. In 1996, competing products entered the minor crop market (Tr. 3387), and BASF lowered the price of Poast, eventually below the price of Poast Plus. D. Ex. 1136.

In 1994, North Dakota's Commissioner of Agriculture urged BASF to make Poast Plus available for use on minor

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[1] For example, BASF had performed 365 safety tests of Poast on sugar beets, but only eight such tests of Poast Plus. D. Ex. 1160.

[2] California declined to register Poast Plus for *any* use in that State because it was not satisfied with BASF's toxicity studies. C. Sanson Affidavit (Feb. 4, 2000) ¶¶ 9, 10; D. Exs. 399, 432, 509.

crops. App., *infra*, 6a. When that failed, she sought an enforcement waiver from EPA that would have allowed North Dakota farmers to use Poast Plus off-label without punishment. Tr. 2655-2660. When EPA denied that request, North Dakota issued a one-year Special Local Needs Registration ("24(c) Registration"), allowing farmers there to use Poast Plus on six minor crops on the basis that the pesticide was less expensive than Poast. Tr. 1816-1817. The State of South Dakota followed suit. Tr. 1761. Subsequently, EPA issued a guidance document stating that price differentials "generally may not" be cited as grounds for 24(c) Registration. EPA, Office of Pesticide Programs, *Guidance on FIFRA § 24(c) Registrations*, at Part IV.1 (Feb. 9, 1996).

*3. **Respondents' Claims.*** Respondents purchased Poast when it was more expensive than Poast Plus. App., *infra*, 4a, 7a. Their suit against BASF under the NJCFA squarely attacked BASF's federally-approved pesticide labeling. They contended that the labeling prevented farmers from learning that Poast Plus was "identical" to Poast (Tr. 1166; Second Amend. Cmplt. (hereinafter "Cmplt.") ¶ 2); from discovering that EPA had registered Poast Plus for the same uses as Poast (Tr. 1420; Cmplt. ¶ 3); and from lawfully using the less-expensive Poast Plus on their minor crops (Tr. 1169-1170; Cmplt. ¶ 12). Respondents also contended that BASF's advertisements and other marketing materials were misleading because, consistent with the labeling, they did not reveal that EPA had registered Poast Plus for minor crops. Cmplt. ¶ 13. It was undisputed, however, that Poast Plus was *not* registered in any state for use on minor crops and that farmers thus could *not* lawfully use it on their minor crops. See Tr. 2661.

To establish their claims of unconscionable conduct, respondents relied heavily on BASF's speech. Over BASF's objections, they presented evidence that, in 1993, BASF's public relations firm submitted an article to *Sugarbeet Grower* magazine discussing the illegality and danger of off-

label use of pesticides. P. Ex. 253B. The article does not mention BASF or its products. *Id.* State regulatory officials quoted in the article testified that it was accurate and helpful. Tr. 1905-1906. Respondents agreed that the article contained "good information" (Tr. 3773), but contended that BASF sponsored and distributed it "for the wrong purpose" (*id.*) – *i.e.*, to intimidate farmers so they would not illegally use Poast Plus off-label.

Respondents also made much of evidence that, in 1992 and 1993, one of BASF's sales representatives informed North Dakota authorities of substantial sales of Poast Plus to retailers in areas where few major crops are grown. P. Ex. 258; Tr. 1859-1861. The State Department of Agriculture investigated the matter and ultimately charged a number of dealers and growers with illegal off-label use of Poast Plus, resulting in guilty pleas and fines. P. Ex. 258; Tr. 518-521, 1861, 1912. Respondents asserted that BASF's reports to government officials, while accurate, were an unconscionable effort to prevent farmers from illegally using Poast Plus for minor crops. See, *e.g.*, Tr. 3777.

4. Trial Court Proceedings. After certifying a nationwide class action, the trial court granted summary judgment for BASF, finding no violation of the NJCFA. The court emphasized that BASF had "the right to choose whether or not to label Poast Plus for use on minor crops" and that respondents had no right to use the product off-label, regardless of its EPA registration. App., *infra*, 73a-74a. It refused to "second-guess the EPA's decision" that Poast and Poast Plus should be registered as separate products. *Id.* at 75a. Finally, the court stated that the *Sugarbeet Grower* magazine article was truthful, and hence could not be a basis for liability. *Ibid.*

After that decision was reversed on appeal (App., *infra*, 65a), the case was tried under the standards of the NJCFA. The court instructed the jury that the NJCFA imposes liability if the defendant has committed an act or omission that

departs from "fair dealing," without any evidence of malice, scienter, reliance, or causation of injury in traditional common law terms. Tr. 3839-3842. Respondents successfully opposed a jury instruction that would have excluded deceptive labeling as a basis for liability. Tr. 3608-3609. The trial court also refused to instruct the jury about BASF's rights and obligations under FIFRA or under state pesticide regulatory regimes. Tr. 3831-3850.

The jury returned a $15 million verdict, which under the NJCFA was automatically trebled to $45 million. After adding interest and attorney's fees, the court entered judgment against BASF in the amount of $52 million.

5. State Intermediate Appellate Court Proceedings. The Minnesota Court of Appeals upheld the jury's verdict in all respects. Of particular relevance here, the court of appeals gave short shrift to BASF's contention that the First Amendment prohibits the use of truthful speech and accurate reports to regulatory authorities as a basis for tort liability. According to the court of appeals, the First Amendment was inapplicable because this "consumer fraud action [] does not raise a libel claim" and the speech, while accurate, was "confusing" or "misleading." App., *infra.*, 49a-50a.

6. State Supreme Court Ruling. The Minnesota Supreme Court granted review on several issues raised by BASF but declined to consider the court of appeals' holding that the First Amendment was inapplicable, thereby making the intermediate appellate court's decision the final state court ruling on that issue. On the merits, the supreme court rejected BASF's preemption argument. Although acknowledging that "FIFRA preempts state actions relating to labeling and packaging" (App., *infra*, 18a), the court stated that "the farmers' claims of unconscionable commercial conduct derived from statements and actions that went beyond the label." *Id.* at 20a. It cited BASF's alleged "misrepresentations about Poast Plus' EPA registration status" in adver-

tisements and in a meeting with North Dakota regulators (*id.* at 21a) and its "failure to seek state registration for Poast Plus on all the crops" (*id.*). It also pointed to BASF's alleged efforts "to prevent word spreading that Poast Plus was registered for use by minor crops" (*id.* at 20a) by "inform[ing] authorities that farmers were using Poast Plus on minor crops" and "submit[ting] a magazine article discussing increased enforcement of fines for failing to follow label recommendations" (*id.*).

According to the Minnesota Supreme Court, the NJCFA reaches both "acts" and "omissions" that are "unconscionable" – which denotes "'an amorphous concept obviously designed to establish a broad business ethic.'" *Id.* at 22a (quoting *Kugler* v. *Romain*, 279 A.2d 640, 651 (N.J. 1971)). The court emphasized, too, that respondents were not obliged to show reliance, but had only to articulate a loose "causal relationship" between petitioner's alleged misconduct and an ascertainable loss. "Given the 'broad business ethic' that the NJCFA [was] designed to create," the court held, respondents' evidence was sufficient to support the jury's verdict. *Id.* at 22a-23a.

REASONS FOR GRANTING THE PETITION

The Minnesota Supreme Court has upheld a $52 million judgment against BASF for conduct that fully complied with FIFRA and EPA's pesticide labeling rules and for truthful speech on matters of public importance. The decision flouts two key federal constraints on state-law actions: preemption and the First Amendment. Because the massive award was imposed in a nationwide class action under an amorphous state "consumer protection" law, the decision will have a serious and immediate impact on the FIFRA program and on corporate speakers across the country. Accordingly, this case plainly merits this Court's review.

Plaintiffs' consumer fraud claims conflict fundamentally with FIFRA's labeling regime. Under FIFRA and its imple-

menting regulations, EPA registration establishes the *maximum* scope of uses for which a pesticide may be labeled, but does not *require* pesticides to be labeled for every EPA-approved use. Instead, an EPA regulation expressly permits manufacturers to label pesticides for a subset of their approved uses. And if the manufacturer does not include a particular use on the label, it is illegal to put the pesticide to that use. Each of these aspects of the regulatory regime is crystal clear, and each has preemptive force under FIFRA. It therefore is beyond dispute that a manufacturer that chooses to label a pesticide for only a subset of its EPA-approved uses may not be held liable under state law for doing so.

Nevertheless, the courts of Minnesota treated as actionable that which the EPA expressly permits, holding that BASF's labeling of Poast Plus for only a subset of its EPA-approved uses – combined with its failure to state that EPA had registered Poast Plus for other uses and its truthful communications regarding illegal off-label pesticide use – creates treble-damages liability under the NJCFA. The Minnesota Supreme Court permitted this end-run around FIFRA preemption on the ground that plaintiffs pointed to evidence outside the labels themselves. But if that is sufficient to avoid preemption, FIFRA's labeling regime – designed to protect human health, the environment, and the food supply – would collapse under the weight of inconsistent state-law requirements.

The decision below also will have effects outside the pesticide industry, because it erases First Amendment protections for any business accused of improper conduct in a consumer fraud action. The court ruled that the First Amendment has no role to play in such cases, even where, as here, the action directly challenges truthful speech on matters of public importance and truthful reports to governmental agencies. Unless this error is corrected, the fear of liability under consumer fraud statutes will inhibit the participation of commercial entities in public discourse, as well as their frank

interaction with regulatory authorities. Moreover, this case involves none of the procedural problems that prevented the Court from reaching many of the same First Amendment issues in *Nike, Inc.* v. *Kasky*, 123 S. Ct. 2554 (2003).

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS HOLDING THAT FIFRA PREEMPTS ANY STATE-LAW CHALLENGE TO PESTICIDE LABELING

FIFRA prohibits states from imposing "*any* requirements for labeling or packaging in addition to or different from those required" by EPA. 7 U.S.C. § 136v(b) (emphasis added). This provision was intended to give EPA "exclusive supervision" over pesticide labeling. *New York State Pesticide Coalition, Inc.* v. *Jorling*, 874 F.2d 115, 118 (2d Cir. 1989). Under the decision below, however, labeling that complies fully with EPA's requirements may give rise to liability under a state consumer fraud statute if a jury concludes that the labeling was "unfair." Tr. 1240. Because this decision conflicts with the rulings of other courts and will immediately disrupt the federal regulatory scheme, it merits review. Furthermore, because this case presents a facet of FIFRA preemption that is related to, but distinct from, the issue that the Court will consider in *Bates* v. *Dow Agrosciences LLC*, cert. granted, 2004 WL 1431958 (U.S. June 28, 2004) (No. 03-388), it provides the Court with an opportunity more fully to define the contours of FIFRA preemption and thus to provide appropriate guidance to the states, the regulated community, and the lower courts.

A. Respondents' Claims Constitute A Direct Attack On Petitioner's EPA-Approved Labels

To avoid preemption, respondents denied that they were raising a label-based claim. Motion Hearing Tr. 25 (Jan. 15, 1999). In at least three ways, however, the judgment clearly rests on respondents' contentions that the EPA-approved Poast and Poast Plus labels were unlawful.

First, respondents repeatedly testified that the omission of minor crops from the Poast Plus labeling wrongfully concealed that EPA had registered the pesticide for those uses.[3] That contention was a prominent theme in the questions and closing arguments of respondents' counsel.[4] Respondents also contended that BASF's advertisements and promotional materials were deceptive in stating – consistently with the Poast Plus label – that Poast Plus was registered for four major crops only and that Poast was the only post-emergent grass killer registered for minor crops. App., *infra*, 5a, 20a.

Second, respondents claimed that BASF's use of "subset labeling" wrongfully denied farmers the right to purchase Poast Plus for use on minor crops. They contended that by omitting minor crops from the labeling BASF implemented "a scheme whereby farmers could be prosecuted for 'off-label' use of Poast Plus." Pl. Cons. Mem. in Opp. to BASF's Mot. In Limine, at 12. One named plaintiff identified this as the principal "basis of [his] complaint against BASF," testi-

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[3] See, *e.g.*, Tr. 1397-1398 (labels were "deceptive" in stating "that Poast Plus could be used only on those four crops"); Tr. 590 (label misleadingly "says you can't use it [for minor crops], but in actuality the registration said it's okay"); Tr. 1448 ("I felt that we were being deceived * * * [because] the crops that were registered for Poast Plus and what was actually put on the label are two different things"); Tr. 1420 ("it could have been used on other crops and * * * the label says only the four crops"); Tr. 1205 ("I'd like to send a message to the industry * * * that you shouldn't lie on the label.").

[4] See, *e.g.*, Tr. 380 ("When you in the business of selling herbicides find out that a label does not accurately reflect the EPA registration status for residue purposes, what does that do to your trust in the label?"); Tr. 1238 ("[W]hat were some of the things you thought were deceptive about the Poast Plus label?"); Tr. 205 ("we've gone through the subject of deceptive packaging"); Tr. 3549 ("We should have trust in the label, and what BASF did was to destroy the trust that consumers should have in that label.").

fying that it was "unfair, unethical, [and] immoral" for BASF not to label Poast Plus for minor crops when "both [Poast and Poast Plus] were registered by EPA." Tr. 1169-1170. Plaintiff's expert (incorrectly) testified, moreover, that EPA "expects" a manufacturer that registers a pesticide "to market the pesticide" for all uses that EPA approves. Tr. 1986.

Third, respondents contended that BASF deceived consumers by labeling Poast and Poast Plus as distinct products. See, *e.g.*, Cmplt. ¶ 2 (alleging that BASF's deceptive acts include "advertis[ing] and market[ing] these equivalent formulations * * * as two separate products under two separate brand names and two separate prices"); Tr. 2528 (BASF "marketed and sold one product as two different products to exploit a segment of the market"). According to respondents, Poast and Poast Plus were "twins" (Tr. 198), and BASF engaged in "deception * * * by making the products look different." Tr. 199; see also Motions Hearing Tr. 25 (Oct. 6, 1998) (BASF wrongfully "distinguish[ed] equivalent products on the bas[is] of a label that is false and misleading"). Respondents repeated this contention frequently during the trial. See, *e.g.*, Tr. 572, 1403-1404, 1450, 2176. At the same time, they successfully opposed instructions that would have informed the jury that EPA regulations *required* Poast and Poast Plus to be labeled as different pesticides. See Tr. 3645-3646.

B. The Minnesota Supreme Court's Refusal To Find Preemption Is Wrong And Conflicts With Decisions Of This And Other Courts

1. Respondents' claims are preempted because they challenge petitioner's product labeling and conflict with the federal regulatory scheme

A vast body of federal and state case law holds that FIFRA preempts *any* state-law claim "which results in the imposition of additional or different labeling requirements,

* * * regardless of the guise under which the claim is presented." *Netland* v. *Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir.), cert. denied, 537 U.S. 949 (2002). See, *e.g.*, *Grenier* v. *Vt. Log Bldgs., Inc.*, 96 F.3d 559, 563 (1st Cir. 1996); *Worm* v. *Am. Cyanamid Co.*, 5 F.3d 744, 749 (4th Cir. 1993); *Dow Agrosciences LLC* v. *Bates*, 332 F.3d 323, 329 (5th Cir. 2003), cert. granted, 2004 WL 1431958 (U.S. June 28, 2004 (No. 03-388); *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995); *Etcheverry* v. *Tri-Ag Serv., Inc.*, 93 Cal. Rptr. 2d 36, 44 (Cal. 2000); *Lewis* v. *American Cyanamid Co.*, 715 A.2d 967, 973 (N.J. 1998). As the United States explained in its amicus brief in *Bates*, this "large and generally consistent body of authority hold[s] that FIFRA preempts state-law causes of action * * * that would require a registrant who has received EPA approval of its label under FIFRA to change that label to avoid future liability." Br. for the U.S. as Amicus Curiae, 2004 WL 1205202, at **14-15 (May 28, 2004) (No. 03-388). Respondents' claims are preempted under this test, because BASF could avoid future liability by adding minor crops to the Poast Plus labeling, as respondents demanded.

Indeed, the argument for preemption here is even stronger than that in *Bates*, and makes this case a useful complement to *Bates*. The *Bates* petitioners, who raised state law crop injury claims, argue against preemption on the ground that EPA does not actively regulate product efficacy. See Petition for a Writ of Certiorari, 2003 WL 22428985, at **22, 28 (Sept. 9, 2003) (No. 03-388). Here, the core labeling conduct that plaintiffs attacked was either *mandated* or *explicitly sanctioned* by FIFRA and its implementing regulations. Accordingly, this Court could rule that respondents' claims are preempted, both expressly by Section 136(v)(b) and under principles of implied conflict preemption, even if it reversed the Fifth Circuit's decision in *Bates*.

As explained above, respondents contended that BASF wrongfully "use[d] the regulations to control" farmers (Tr.

3760) by omitting certain EPA-registered uses of Poast Plus from its labeling. EPA's "subset labeling" regulation, however, expressly *permits* manufacturers to limit the use of their products through the labeling. 40 C.F.R. § 152.130(b). Indeed, this degree of manufacturer "control" over the use of pesticides is inherent in FIFRA's basic structure, under which the *manufacturer* decides which crops to include in any application to register a pesticide. Respondents' claim that it was unconscionable for BASF to register but then not sell Poast Plus for a broad range of uses thus is preempted – both expressly, because it challenges BASF's EPA-approved labeling, and impliedly, because it seeks to limit the availability of an option provided by federal law. "[A] state cannot impose common law damages on individuals for doing what a federal act or regulation 'authorized them to do.'" *Irving* v. *Mazda Motor Corp.*, 136 F.3d 764, 769 (7th Cir. 1998) (quoting *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)). See also *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 881-882 (2000); *Fidelity Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 156 (1982).

Respondents' effort to impose state law liability on BASF for failing to disclose the full extent of EPA's registration of Poast Plus, in communications apart from the labeling, conflicts with the federal regulatory scheme as well. Under FIFRA, the *labeling*, not federal registration, governs how consumers may use pesticides. EPA stressed its policy that "the label is the law" when it refused to grant an enforcement waiver allowing North Dakota farmers to use Poast Plus off-label. D. Ex. 636. In their letter to North Dakota regulatory authorities, EPA officials explained that allowing Poast Plus to be used on minor crops would "undermine the basic understanding by farmers that they must follow the labeling on a specific product, * * * cause confusion in the regulated marketplace, and, in effect, [encourage] pesticide misuse." *Id.* at 2. If BASF were forced by

state law to tell farmers that (despite the federally-approved label) it had secured EPA registration of Poast Plus for minor crops, that likewise would have undermined the regulatory scheme by encouraging farmers to experiment with uses of the product that were *not* covered by the label's directions and that the states had *not* authorized. Indeed, any such statements could have been challenged as promoting off-label pesticide use, violating federal law. See 7 U.S.C. § 136j(a)(1)(B).

Respondents worsened this conflict with federal law by contending that BASF exploited and deceived them by labeling Poast and Poast Plus as two separate products for which it could charge different prices. Because of the chemical differences between Poast and Poast Plus, EPA *required* that they be registered as different pesticides having different names. See 40 C.F.R. §§ 152.15, 152.43(b)(1)-(4), 158.175; Label Review Manual, at Part IV.C; Tr. 2572. Respondents' claim that BASF violated state law by making the two pesticides "look different" (Tr. 199) thus clashes with federal requirements.

2. *The Minnesota Supreme Court's decision conflicts with decisions of many other courts*

Because respondents' consumer fraud claims, if successful, would "induce [BASF] to alter its product label" to avoid future liability (*Bates*, 332 F.2d at 331), straightforward application of FIFRA preemption doctrine should have resulted in dismissal of this case. The Minnesota Supreme Court, however, ruled against preemption because the "claims of unconscionable commercial conduct * * * went beyond the label." App., *infra*, 20a. To support that statement, the court relied heavily on BASF's alleged "misrepresentations about Poast Plus' EPA registration" (App., *infra*, 21a), particularly in its advertisements. See *id.* at 20a. ("BASF advertised Poast Plus as only 'registered' for use on cotton, soybeans, peanuts, and alfalfa, and advertised that Poast was the 'only' post-

emergent grass herbicide registered for use on minor crops."). The "'problem,'" it said, was "BASF's failure to seek state registration for Poast Plus on all the crops" and to advertise that EPA had registered the product for minor crops. *Id.* at 21a.

In so holding, the Minnesota Supreme Court adopted an overly narrow view of FIFRA preemption that brought it into conflict with decisions of this Court, federal courts of appeals and state supreme courts. *First*, other courts have specifically refused to entertain state-law challenges to advertisements or promotional materials that either make statements consistent with pesticide labeling or omit information that was not on the labeling but could have been included there. See *Taylor Ag.*, 54 F.3d at 561 (claim based on inadequate advertisements and point-of-sale warnings preempted because it "is premised ultimately upon the inadequacy of the product label"); *Worm*, 5 F.3d at 748 (failure-to-warn claim was preempted notwithstanding plaintiff's argument that defendant "could comply with any common law duty" without changing its label "through statements made in other ways, for example through point-of-sale notices"); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993) ("claims challenging the adequacy of warnings on materials other than the label or package of a product necessarily imply that the labeling and packaging failed to warn the user"). These courts have concluded that such claims "necessarily challenge the label itself and are therefore preempted." *Kuiper* v. *Am. Cyanamid Co.*, 131 F.3d 656, 663 (7th Cir. 1997). Many courts – including the Fifth Circuit in *Bates* – have found this preemption rule fully applicable to claims that advertisements or other statements concerning pesticides, separate from the labeling, violated state consumer fraud statutes. See *Bates*, 332 F.2d at 331-332 (claim that retailers' comments violated Texas Deceptive Trade Practices Act preempted); see also *Mortellite* v. *Novartis Crop Protection, Inc.*, 278 F. Supp. 2d 390, 399 (D.N.J. 2003) (claim that representations in brochure violated

NJCFA preempted); *Dahlman Farms, Inc.* v. *FMC Corp.*, 240 F. Supp. 2d 1012, 1020 (D. Minn. 2002) (claim that advertisements and other "off-label" statements violated Minnesota consumer fraud statute preempted).

Here, the allegedly deceptive advertisements and promotional statements were consistent with the EPA-approved Poast Plus labeling: they accurately informed farmers that the pesticide – which was *not* registered for minor crops in any state – could lawfully be used only on four major crops. In ruling that respondents' claims were *not* preempted because they were based, in part, on such advertisements, the Minnesota Supreme Court put itself in conflict with the cases listed above.

Second, the state court's suggestion that BASF's failure to obtain state registrations for minor-crop use of Poast Plus was actionable (App., *infra*, 21a) conflicts with this Court's decisions. As discussed above, the EPA's "subset labeling" rule establishes that a manufacturer is *not* required to market its pesticides for each and every EPA-registered use. That rule also authorizes manufacturers to choose *not* to register every pesticide in every state for every EPA-authorized use. The judgment below eliminates, under state law, an option that federal law expressly provides to further federal interests. This Court has explained that such theories of liability are preempted. See *Geier*, 529 U.S. at 881-882; *de la Cuesta*, 458 U.S. at 156.

The Minnesota Supreme Court's ruling that BASF can be held liable under state law for employing subset labeling also conflicts with *Nathan Kimmel, Inc.* v. *DowElanco*, 275 F.3d 1199, 1206 (9th Cir. 2002), holding that FIFRA impliedly preempts claims that a manufacturer has committed a state-law tort by "abus[ing] * * * the [federal] labeling process." In *Kimmel*, the defendant's pesticide labeling authorized the use of a variety of nylon polymer bags to protect materials located at fumigated sites. The plaintiff contended that the de-

fendant lied to EPA to procure a labeling change that was calculated to exclude plaintiff from the nylon polymer bag market. Concluding that FIFRA's requirements were "a critical element" of plaintiff's state-law claims, the Ninth Circuit held that the claims were preempted. *Id.* (citing *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 353 (2001)). Here, analogously, respondents' claim depended on BASF's decision to secure EPA registration of Poast Plus for minor crops but to exclude those crops from the final, EPA-approved label. FIFRA both expressly and impliedly preempts any state-law claim so intertwined with federally-supervised conduct, lest FIFRA registrants be required to "satisfy not only the standards imposed by [EPA] under federal law, but also the potentially heterogeneous standards propounded by each of the 50 states." *Id.*

C. The Decision Below Will Upset FIFRA's Regulatory Scheme

The Minnesota Supreme Court's decision poses a real and immediate threat to this country's system of pesticide regulation by eliminating EPA's exclusive authority over pesticide labeling. Henceforth, manufacturers will not know which pesticide labeling rules they should follow: those established by EPA under FIFRA, or those established by post-hoc applications of amorphous consumer fraud laws. Given the growing willingness of state courts to apply one state's law in a class action challenging nationwide conduct (see, *e.g.*, *Avery* v. *State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242 (Ill. App. Ct. 2001); *Wershba* v. *Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145, 160 (Cal. Ct. App. 2001); see generally Barry A. Weprin, *Plaintiffs' Perspective on Recent Developments in Class Certification of Sales Practice Claims: The Focus Shifts to State Consumer Statutes*, SH084 A.L.I.-A.B.A. 273, 281-292 (May 2003)), as well as the prevalence of broad consumer fraud statutes, the resulting confusion will not be limited to Minnesota or New Jersey, but will exist throughout the country.

Most immediately, the decision below will make it risky for manufacturers to follow EPA's "subset labeling" regulation. When farmers began to complain about BASF's conduct in 1997, the head of EPA's pesticide division stated publicly that the targeted practices were "perfectly legal" under FIFRA. *Farmers Win Fight With Pesticide Company*, THE BISMARCK TRIBUNE (May 18, 1997), at 8A; see also *id.* (EPA official Don Stubbs states that "there's nothing illegal about [these practices] in any way"). Under the Minnesota Supreme Court's ruling, however, a manufacturer's decision not to seek state registration for an EPA-registered use, and hence to exclude that use from the product labeling, is grounds for an award of treble damages under state law. The decision thus fundamentally changes the nature of federal pesticide registration, by transforming EPA's grant of *permission* to market a pesticide into a state-law *obligation* to market the pesticide.

To avoid the risk of state-law liability under this regime, manufacturers will be forced to rush their EPA-registered pesticides to market for all uses, even if they have not completed all of the testing that they believe is optimal. Alternatively, they may delay registration of new pesticides, or register only those crops that offer the greatest financial returns and the lowest risks. Or manufacturers may seek to protect themselves by bombarding the marketplace with information about EPA-registered uses that have not been approved by the states or included on product labeling, thus confusing pesticide users, promoting illegal off-label use, and undermining EPA's policy that "the label is the law."

The decision also will make it treacherous for manufacturers to register different products having the same active ingredient. *Many* different pesticides share active ingredients: at the time of trial, there were on the market approximately 20,000 registered pesticides having a total of about 400 active ingredients. Tr. 2600-2601. As noted above, EPA *requires* pesticides to be registered, labeled, and marketed as

distinct products, even if they have the same active ingredient, if their chemical compositions are sufficiently different. Under the decision below, a manufacturer that registers two pesticides having the same active ingredient as separate products is subject to the charge that it is unfairly manipulating the regulatory regime by selling the same pesticides at different prices. But neither Congress in enacting FIFRA, nor the EPA in promulgating its pesticide labeling regulations, intended to impose on manufacturers any duty *not* to charge the market price for registered pesticide products. To the contrary, EPA has made clear, after considering the circumstances in this very case, that differential pricing of pesticides does not justify state interference with a manufacturer's labeling decisions. See page 6, *supra*.[5]

Perhaps most seriously, the decision below will frustrate the cooperative federal/state "regulatory partnership" (*Mortier*, 501 U.S. at 615) that Congress established in FIFRA. The Minnesota court has effectively ruled that BASF should have sold Poast Plus for minor crops in all 50 states – despite the fact that no state had authorized such use and one state (California) affirmatively refused BASF's application to register Poast Plus for *any* use. See n.2, *supra*. The ruling thus allows one state's application of consumer fraud law to override the other states' control over pesticide use within their borders. Unless corrected, the decision inevitably will inter-

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[5] A rule requiring pesticide products having the same active ingredient to be priced the same would not help farmers. Among other things, it would exacerbate the shortage of pesticides for minor crops – which the United States Department of Agriculture already considers a serious concern (D. Exs. 939, 940) – by discouraging the registration of pesticides for use on those high-risk, low-return crops. See, *e.g.*, EPA, *Report on Minor Uses of Pesticides* (1996), at 3 ("minor uses are not always economically attractive to the pesticide industry, because the amount of pesticides sold for these uses is limited and revenues may be low, while the costs to obtain and maintain registration are substantial"); Tr. 3247-3248.

fere with the states' authority over pesticide use by forcing manufacturers to publicize EPA registrations whether or not comparable state registrations have been secured.

The decision below subjects manufacturers to inconsistent obligations and hence disrupts FIFRA's regulatory scheme. Unless corrected, it will prompt other plaintiffs to claim that manufacturers have in other ways "exploited the federal and state herbicide regulatory processes" (Pl. Cons. Mem. in Opp. to BASF's Mot. in Limine, at 10) or made labeling decisions that are "unfair" under state consumer protection laws. The Court should seize this opportunity to review the important FIFRA preemption issue that this case presents, in conjunction with its review of *Bates*.

II. THE DECISION BELOW PENALIZES TRUTHFUL SPEECH AND THEREFORE CANNOT BE RECONCILED WITH THE FIRST AMENDMENT

The First Amendment aspect of the decisions below also warrants review. The Minnesota courts held that *truthful* speech on matters of public concern may be an "unconscionable" practice that gives rise to liability under state law. That holding, which runs afoul of fundamental First Amendment principles long articulated by this Court, inevitably will "chill a speaker's efforts to engage in public debate." *Nike, Inc.* v. *Kasky*, 123 S. Ct. at 2567 (Breyer, J., dissenting). For this reason, the decision below raises many of the same concerns that the Court considered but failed to resolve last Term in *Nike*: like the California statute at issue in that case, Minnesota's application of the New Jersey consumer protection law imposes liability for engaging in speech without providing any of the protection traditionally thought necessary to safeguard participants in public debate.

A. The Decision Below Rests On A Holding That Petitioner's Truthful Speech Was "Unconscionable"

In making out their claim of "unconscionable commercial conduct," respondents relied on *truthful* statements that BASF made on subjects of public concern. Respondents premised liability on two such statements that are entitled to full First Amendment protection. The first was an article, submitted by petitioner's public relations firm and published in *Sugarbeet Grower* magazine, "which discussed the illegality of off-label use of pesticides and increased enforcement of penalties for not following the recommendations on pesticide labels." App., *infra*, 5a-6a. Respondents acknowledged below that the statements in this article – which did not mention Poast or Poast Plus (or, for that matter, any BASF product) – were entirely accurate (see Tr. 3773) and addressed "significant matters of public concern." Pl. Cons. Mem. in Opp. to BASF's Mot. in Limine, at 61.

Respondents also relied on the report by a BASF employee to North Dakota authorities that substantial sales of Poast Plus had been made to retailers in areas of the State where few Poast Plus-approved crops are grown. See App., *infra*, 5a, 20a. Again, it is undisputed that the report was accurate. Indeed, in response, North Dakota authorities investigated and commenced *successful* enforcement actions against a number of dealers and farmers for illegal off-label use of Poast Plus (see *id.* at 5a, 31a) that continued even after state officials learned that EPA had registered Poast Plus for use on minor crops. Tr. 529-533.

Respondents took the position that these two instances of truthful speech were "unconscionable" (and therefore actionable) under the NJCFA because they represented an "attempt[] to prevent word from spreading that Poast Plus was registered for use on minor crops." App., *infra.*, 20a. As respondents' counsel put it in their closing argument, the

Sugarbeet Grower article was "good information but done for the wrong purpose." Tr. 3773. The courts below accepted that theory of liability, identifying the article and the report to North Dakota agriculture authorities as essential components of "the farmers' claims of unconscionable commercial conduct." App., *infra*, 20a; see also *id.* at 49a-50a. In doing so, the Minnesota Court of Appeals (with the implicit approval of the Minnesota Supreme Court) rejected petitioner's argument that these statements were protected by the First Amendment and therefore could not be a basis for liability, holding that the First Amendment does not apply here because "there is no claim that the reports that BASF seeks to protect were defamatory or that prior restraint was at issue" and that "[t]his consumer fraud action * * * does not raise a libel claim." *Id.*

B. The Decision Below Conflicts With This Court's First Amendment Rulings

The court of appeals' ruling cannot be reconciled with this Court's settled doctrine, for several reasons. *First*, the state court evidenced a shocking disregard for this Court's decisions when it concluded that the First Amendment does not limit the use of speech to establish liability so long as the case does not involve defamation, libel, or a prior restraint. Whatever the context in which a claim arises, it is fundamental that "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages" (*NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 916-917 (1982)) – and "[t]he fact that such activity is constitutionally protected * * * imposes a special obligation on [a court] to examine critically the basis on which liability was imposed." *Id.* at 915. As a consequence, innumerable decisions of this Court, involving the widest range of circumstances *outside* of the libel and prior restraint contexts, have invalidated state attempts to restrict or punish speech. See, *e.g.*, *Harte-Hanks Communica-*

tions, Inc. v. *Connaughton*, 491 U.S. 657, 685 n.33 (1989) (listing examples); *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 56 (1988); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967). The judgment below is flatly inconsistent with this principle and should be set aside for that reason alone.

Second, in failing to accord First Amendment protections to reports delivered to government officials, the Minnesota courts disregarded a long line of this Court's decisions recognizing that the right "to petition the Government for a redress of grievances" is "an assurance of a particular freedom of expression." *McDonald* v. *Smith*, 472 U.S. 479, 482 (1985). The Court has explained that the principles animating the right to petition make it impermissible for the state to punish those who undertake "to influence public officials" – regardless of the petitioning person's "intent or purpose." *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 669-670 (1965). See, *e.g.*, *Prof'l Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56-57 (1993); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).[6] Thus, for example, "efforts to influence public officials" cannot be made unlawful "even though intended to eliminate competition." *Pennington*, 381 U.S. at 670. See *Noerr*, 365 U.S. at 138-139. To be sure, the Court has held that liability may be imposed when the petition is a "sham." See *Professional Real Estate Investors*, 508

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[6] Although the *Noerr-Pennington* doctrine initially was articulated in cases construing the Sherman Act, both this Court and the federal courts of appeals have since held that the right to petition precludes the imposition of liability for addressing the government "in other contexts." *Prof'l Real Estate Investors*, 508 U.S. at 59 (citing cases). See, *e.g.*, *BE & K Constr. Co.* v. *NLRB*, 536 U.S. 516, 528-533 (2002); *Claiborne Hardware*, 458 U.S. at 913-914; *Cardtoons, L.C.* v. *Am. League Baseball Players Ass'n*, 208 F.3d 885, 889-890 (10th Cir. 2000) (en banc). There is no doubt that such decisions rest (or could rest) "solely on the basis of the right to petition." *Cardtoons*, 208 F.3d at 889.

U.S. at 58. But there was (and could be) no suggestion that the reports to North Dakota officials in this case fell within that exception. A petition may be regarded as a "sham" only when it is "objectively baseless" (*id.* at 60), a standard that cannot be satisfied where, as here, the petitioning activity results in *successful* state enforcement actions.

Third, it should go without saying that "state action to punish the publication of *truthful* information seldom can satisfy constitutional standards." *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979) (emphasis added). The Court has held repeatedly that, as a general matter, speech on matters of public concern may not give rise to liability absent a showing of falsity. See, *e.g.*, *Hustler Magazine*, 485 U.S. at 56; *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 775-776 (1986); *Garrison* v. *Louisiana*, 379 U.S. 64, 73-74 (1964). That is so even when the speech is the product of a "bad motive" (*Hustler Magazine*, 485 U.S. at 53), or when the speaker acted out of "hatred or ill will" (*id.*), or even when the statement is made with "actual malice." *Garrison*, 379 U.S. at 78. Indeed, most of the Court's decisions in this area were designed to ensure that claims of falsity do not squeeze out the "breathing space" needed to encourage truthful speech on matters of public concern. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 272 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). See also *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 602 (2003) ("[e]xacting proof requirements" are necessary "to provide sufficient breathing room for protected speech"). Where, as here, the speech is conceded to be truthful, liability is presumptively improper.

Regulations suppressing or punishing truthful speech are permissible in extraordinary circumstances; statements "incit[ing] lawless action" (*Claiborne Hardware*, 458 U.S. at 928) or publicizing military plans in time of war (*Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931)) come to mind as examples. But such regulations may be sustained only on a

showing that they are necessary "to further a state interest of the highest order." *Daily Mail Publ'g*, 443 U.S. at 103. The courts below did not ask for, and respondents did not attempt to make, such a showing in this case. "Simply labeling an action one for 'fraud,' of course, will not carry the day." *Telemarketing Assocs.*, 538 U.S. at 617. But that is all that the courts below found necessary to reject the First Amendment argument here. See App., *infra*, 49a-50a (challenged evidence was admissible because it "was used to support the farmers' claim of consumer fraud"). Such an analysis is insupportable. Cf. *Nike*, 123 S. Ct. at 2566 (Breyer, J., dissenting) ("I doubt that this particular regulation * * * can survive heightened scrutiny, for there is no reasonable 'fit' between the burden it imposes upon speech and the important governmental 'interest served'") (citation omitted).

C. The Decisions Below Will Chill Speech Nationwide

The constitutional error committed by the courts below is an egregious and inexplicable one that, if not corrected, will have serious consequences closely akin to those identified by five Members of the Court in *Nike*. Although the New Jersey statute invoked by respondents in this case is not identical to the California law at issue in *Nike*, the statutes share significant characteristics: both are extraordinarily broad and notably vague. The NJCFA hinges liability on proof of an "unconscionable commercial practice" (N.J. Stat. Ann. § 56:8-2), which means, in essence, anything that a jury finds distasteful. That is not an exaggeration: as the court below itself observed, "'[u]nconscionable commercial practice' in this context is an amorphous concept obviously designed to establish a broad business ethic. * * * The standard of conduct that the term 'unconscionable' implies is lack of good faith, honesty in fact and observance of fair dealing." App., *infra*, 22a (citations and quotation marks omitted). Moreover, as the court below also acknowledged, the New Jersey statute "provides that an offense arises 'whether or not any person

has in fact been misled, deceived or damaged thereby.' N.J. Stat. Ann. 56:8-2. Consumer fraud in New Jersey, in contrast with common law fraud, does not require a showing of reliance, merely a causal relationship.'" *Id.* at 23a (quotation marks omitted). And for certain types of "unconscionable" conduct, "'[i]ntent is not an essential element * * * and the plaintiff need not prove that the defendant intended to commit an unlawful act.'" *Id.* at 34a (*quoting Cox* v. *Sears Roebuck Co.*, 647 A.2d 454, 462 (N.J. 1994)).[7]

Against this background, and for the reasons articulated by Justice Breyer in *Nike*, "[i]f permitted to stand, the state court's decision may well 'chill' the exercise of free speech rights." 123 S. Ct. at 2568 (Breyer, J., dissenting). The avowedly vague nature of New Jersey's liability standard makes it impossible for commercial actors to be confident that their truthful speech will not later be deemed by a jury to violate a "broad business ethic." Virtually any communication could be punished under that nebulous standard. And that danger is further compounded by the considerations identified by the United States in its brief supporting reversal in *Nike*. The

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[7] The California consumer protection law at issue in *Nike* shared many of these characteristics. See *Nike*, 123 S. Ct. at 2566-2567 (Breyer, J., dissenting). The principal distinction between the two laws is that California's allows suits by persons who have suffered no injury (see *id.*), while New Jersey's requires an undefined "causal relationship" between the defendant's act and an injury to the plaintiff. But there is less to this distinction than may appear. As we note in text, as construed by the Minnesota Supreme Court in this case, the NJCFA requires no showing that anyone relied on the "unconscionable" statement or was in fact misled by it. Under respondents' "fraud on the market" theory, therefore, *all* purchasers of Poast during the class period were eligible to sue. For that reason, respondents did not even try to establish that any of them was aware of the *Sugarbeet Grower* article or the report to North Dakota authorities, much less relied on them in a way that resulted in injury.

government noted that elimination of the familiar requirements of reliance and actual deception removes important "self-limiting principles of common-law actions for fraud" and "may thus deter commercial speakers from addressing the very issues of public concern about which they may be most knowledgeable, despite the fact that the speakers believe their statements 'to be true' and even though the statements are 'in fact true.'" *Nike, Inc.* v. *Kasky*, Br. for the U.S. as Amicus Curiae, 2003 WL 899100, at **12, 25 (Feb. 28 2003) (No. 02-575). This is an untenable result: as Justice Stevens observed in *Nike*, "[k]nowledgeable persons should be free to participate in such debate without fear of unfair reprisal. The interest in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore * * * a matter of great importance." *Nike*, 123 S. Ct. at 2559 (Stevens, J., concurring).

As these observations suggest, the holdings below can be expected to have a widespread adverse effect on speech. Many states have consumer protection statutes that, like the ones in New Jersey and California, are written in broad and vague terms. See generally John S. Kiernan, *et al., Developments in Consumer Fraud Class Action Law*, 537 PLI/Pat 237, 278-283 (1998). And as this case demonstrates, the availability of national class actions means that the New Jersey statute at issue here may itself be invoked anywhere in the Nation. In these circumstances, "refusal immediately to review the state-court decision * * * will 'seriously erode' the federal constitutional policy in favor of free speech." *Nike*, 123 S. Ct. at 2568 (Breyer, J., dissenting). If the decisions below awarding trebled "damages" of $45 million are permitted to stand, "both [BASF] and other potential speakers, out of reasonable caution or even an excess of caution, may censor their own expression well beyond what the law may constitutionally demand. * * * That is what a 'chilling effect' means. It is present here." *Id.* at 2569.

In fact, the decisions below present both a better vehicle for review and a more pernicious holding than did the state-court ruling in *Nike*. There were serious finality and standing concerns in *Nike*, which evidently were responsible for the Court's decision to dismiss the writ of certiorari in that case as improvidently granted (see 123 S. Ct. at 2555-2558 (Stevens, J., concurring)); there are no such impediments to review in this case. And *Nike* involved a decision imposing liability on speech that assertedly was false (see *id.* at 2558-2559); here, the speech giving rise to liability concededly is *truthful*.[8] If, notwithstanding the First Amendment, such speech may be made the basis for liability and treble damages under state law, it should be this Court that says so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[8] For that reason, there is no need to distinguish between commercial and noncommercial speech in the circumstances of this case because, even where the former category of speech is at issue, "the First Amendment 'embraces at the least the liberty to discuss publicly and truthfully all matters of public concern.'" *Nike*, 123 S. Ct. at 2565 (Breyer, J., dissenting) (quoting *Consolidated Edison Co. of N.Y., Inc.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 534 (1980) (quotation marks omitted)). So far as the challenged statements are concerned, that is what BASF did here.

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APPENDIX

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Supreme Court of Minnesota

RONALD PETERSON, ET AL.,
Respondents,

v.

BASF CORPORATION, *a foreign corporation*,
Appellant.

No. C3-02-857.

Feb. 19, 2004.

Heard, considered, and decided by
the court en banc.

OPINION

GILBERT, Justice.

This appeal arises out of a nationwide consumer fraud class action in which a group of farmers ("farmers") asserted that BASF Corporation's ("BASF") marketing misled and deceived American farmers into believing that a BASF herbicide, Poast Plus, could not be used on crops such as sugar beets. The farmers claimed that BASF's marketing manipulated them into purchasing Poast, a higher-priced BASF herbicide. BASF appeals the judgment rendered against it for violating the New Jersey Consumer Fraud Act ("NJCFA"), N.J. Stat. Ann. §§ 56:8-1-56:8-116 (West 2002), which the court of appeals affirmed. BASF argues that class certification and the application of New Jersey law to all the claims in the class were inappropriate, federal law preempts the farmers' consumer fraud claims, and the evidence was not sufficient to establish consumer fraud under the NJCFA. We affirm.

BASF is a Delaware corporation with its principal office in New Jersey. In the late 1970s and early 1980s, BASF began developing and testing Poast herbicide for use in control-

ling grass weeds. Around 1982, BASF registered Poast with the Environmental Protection Agency (EPA) as a post-emergent grass herbicide and began marketing the product for use. Over time, BASF sought approval from the EPA for the use of Poast on more crops and by 1992 Poast was EPA and state registered for use on over 60 crops, including all "major" crops most "minor" crops.

"Major," or high acreage crops, include soybeans, corn, and cotton, which are farmed on millions of acres of land but provide a relatively low financial return per acre. "Minor," or high value crops, include sugar beets, vegetables, grapes, citrus fruits, and sunflowers. These crops are farmed on fewer acres, but yield a much greater profit per acre. When Poast was developed, it was the only post-emergent herbicide available for use on a number of minor crops. According to research funded by the United States Department of Agriculture, the herbicide market for minor crops has little competition because the market potential for a pest control product on specific crops is low, giving agricultural companies little incentive to absorb the cost of developing the data necessary for registration of a herbicide on individual crops, particularly minor crops.[1]

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") is a comprehensive regulatory system that governs herbicide/pesticide marketing and use.[2] FIFRA provides that a pesticide may only be distributed or used on a particu-

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[1] Interregional Research Project No. 4 (The IR-4 Project), A Minor Crop Pest Control Strategy: 1995-2002.

[2] The terms "herbicide" and "pesticide" are used interchangeably in this opinion. Under the FIFRA, the term "pesticide" means "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest," which includes "weed[s]." 7 U.S.C. § 136(t), (u) (2000).

lar crop if the EPA has registered it for use on that crop. 7 U.S.C. § 136a(a) (2000). In addition, a state may regulate the sale or use of any federally registered pesticide to the extent the regulation does not permit any sale or use prohibited by federal law. 7 U.S.C. § 136v(a) (2000). The EPA does not, however, regulate marketing decisions on pesticide use. Federal regulations provide that "[a] registrant may distribute or sell a product under labeling bearing any subset of the approved directions for use, * * *." 40 C.F.R. § 152.130(b) (2000). However, if a registrant does not sell a product for use on a crop with labeling bearing approved directions for use, a state may, under section 24(c) of FIFRA, issue a "special local needs" registration for a product for crop uses that the EPA has approved. See 40 C.F.R. §§ 162.150-162.156 (2000).

In addition to registration requirements, federal regulations require distributors of pesticides to comply with packaging and labeling regulations. "Every pesticide product shall bear a label containing the information specified by [FIFRA] and the regulations in this part * * *." 40 C.F.R. § 156.10(a)(1) (2000). Pesticide labels must contain information on content, hazards, instructions for use, restrictions on use, and much more. *Id.* Use of a pesticide for a purpose or product not specified in the label is referred to as "off-label" use.

In the late 1980s, BASF began developing another agricultural herbicide, Poast Plus. Evidence was presented at trial on the similarities and differences between Poast and Poast Plus. The two products contain the same active ingredient, sethoxydim, which is equivalent between them in amounts distributed per acre.[3] Poast Plus, however, also con-

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[3] Poast is formulated with 18% sethoxydim and covers 8 acres per gallon after being mixed – a ratio of 0.19 pounds/acre. Poast

tains a crop oil adjuvant[4] that, according to its patent, allows the mix, when added to water, to provide "equal or better herbicidal efficiency" than standard herbicide formations when mixed. Poast and Poast Plus are patented separately and the EPA required BASF to register the products separately. See 40 C.F.R. § 152.43(a) (2000).[5] The EPA registered Poast Plus for use on the same 60 crops for which Poast was registered because registration was based on the same residue data that BASF used for Poast, which the EPA allowed because the two products use the same active ingredient.

However, BASF obtained state registration and labeled Poast Plus for use on only four crops: soybeans, cotton, peanuts, and alfalfa. From 1992-1996, Poast Plus was priced at approximately $4 per acre less than Poast. Evidence was presented at trial that BASF's strategy was to segment the market for the products between major and minor crops. For example, a 1990 BASF marketing plan stated that BASF's goal was to systematically replace Poast sales in soybeans and cotton with Poast Plus while aggressively positioning the higher-priced Poast in the market for minor crops, where there was less competition. The farmers argued that by limiting the number of crops for which Poast Plus was labeled, BASF was able to target the less-expensive Poast Plus in the

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Plus is formulated with 13% sethoxydim and covers 5.3 acres per gallon after being mixed – a ratio of 0.19 pounds/acre.

[4] An "adjuvant" is "an ingredient (as in a prescription or a solution) that modifies the action of the principal ingredient." *Merriam Webster's Collegiate Dictionary* 15 (10th ed. 1986).

[5] "A product proposed for registration must have a single, defined composition, except that EPA may approve a basic formulation and one or more alternative formulations for a single product." 40 C.F.R. § 152.43(a) (2000).

more competitive major crop market and target Poast for sale in the less competitive minor crop market. According to the farmers, evidence indicated that BASF intended to conceal that Poast Plus was EPA approved for the same 60 crops as Poast.

The farmers presented evidence at trial that BASF advertised Poast as the "only" post-emergent grass herbicide registered for use on minor crops. Poast Plus, according to BASF advertisements, was "registered" for use only on cotton, soybeans, peanuts, and alfalfa, while Poast was "registered" for use on over 60 crops. BASF mailed a letter to food suppliers enclosing a list of BASF products and the crops for which they were registered making these claims. The letter stated that the goal of this list was to "ensure our food supply remains the safest in the world" by "informing producers and processors alike of proper pesticide use." A BASF executive testified that he considered it a material omission to say that Poast Plus was only registered for use on four crops.

In the early-to-mid 1990s, sugar beet farmers in North Dakota began to purchase the less expensive Poast Plus and use it off-label on crops not labeled for use by Poast Plus. A BASF sales representative informed the North Dakota Department of Agriculture of the off-label use, which led the department to fine these farmers as well as the wholesale distributors of Poast Plus.[6] To further inhibit off-label use, BASF's public relations firm submitted an article published in *Sugarbeet Grower* magazine, which discussed the illegality of off-label use of herbicides and increased enforcement

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[6] FIFRA allows the EPA and state departments of agriculture to enforce violations of product labels ("off-label" use) with civil administrative penalties, criminal sanctions, and fines. See 7 U.S.C. § 136j-m (2000).

of penalties for not following the recommendations on pesticide labels.

The North Dakota Commissioner of Agriculture began to investigate Poast Plus' registration by making inquiries with BASF and the EPA. BASF representatives responded that BASF could not add crops to the Poast Plus label because the EPA would require it to do further residue testing, which would cost the company millions of dollars. The EPA, however, responded with information that Poast Plus was registered for use on the same crops as Poast, and that the farmers' problem stemmed from a company marketing decision. In 1995, the State of North Dakota and the State of South Dakota issued section 24(c) special local needs registrations for Poast Plus to be used on minor crops such as sugar beets and dry beans. BASF wrote the EPA, arguing that the purpose of section 24(c) registrations was violated by states being allowed to issue them solely on the basis that Poast Plus was a less-expensive sethoxydim-based product.

This class action before us here on appeal commenced in 1997. On July 15, 1999, the district court certified a nationwide class of plaintiffs to bring suit under the NJCFA,[7] finding that the farmers met the requirements of Minn. R. Civ. P. 23. The court concluded that it was neither arbitrary nor fundamentally unfair to certify a nationwide class for claims brought under the NJCFA and that class certification was ap-

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[7] The New Jersey Consumer Fraud Act provides, in part, "The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate * * * is declared to be an unlawful practice." N.J. Stat. Ann. § 56:8-2 (West 2002).

propriate because of the vast number of potential plaintiffs, the small size of individual claims, the common nature of the claims based on BASF's national marketing practices, and the public interest in seeing that the rights of consumers are vindicated. The class consists of U.S. farmers who purchased Poast herbicide from BASF from 1992-96, excluding North Dakota farmers who had previously brought a separate class action suit that was settled in 1997. On March 1, 2000, the district court denied BASF's subsequent motion to decertify the class, but granted BASF's motion for summary judgment, concluding that BASF's actions were not fraudulent or unconscionable and the farmers did not suffer an ascertainable loss, as required by the NJCFA.

On April 27, 2000, the farmers filed an appeal with the court of appeals, challenging the district court's grant of summary judgment. On May 1 and May 2, 2000, BASF filed notices of review pursuant to Minn. R. Civ. App. P. 106,[8] specifically challenging in both that the district court erred (1) in certifying a nationwide class under the NJCFA and (2) in denying BASF's later motion to decertify the class. The court of appeals ordered that BASF's separate appeals were unnecessary and that both parties could proceed with their issues in the farmers' appeal.

After hearing both arguments, the court of appeals reversed the district court's grant of summary judgment, holding that "whether BASF's actions rise to the level of fraud or an unconscionable commercial practice under the [NJCFA] are issues for a jury to decide." *Peterson v. BASF Corp.*, 618 N.W.2d 821, 825 (Minn. App.), *rev. denied* (Minn. Jan. 26,

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[8] "A respondent may obtain review of a judgment or order entered in the same action which may adversely affect respondent by filing a notice of review with the clerk of the appellate courts * * *." Minn. R. Civ. App. P. 106.

2001) ("*Peterson I*"). The court of appeals also held that the district court's decision to certify the farmers as a class was not an abuse of discretion. *Id.* at 826.

Following *Peterson I*, BASF petitioned us for review on two specific issues: (1) whether *Peterson I* improperly created a new duty requiring a manufacturer to provide the farmers with the opportunity to purchase a herbicide for a specific use, and (2) whether *Peterson I* improperly created a measure of damages based on the lost opportunity to choose to purchase Poast Plus and "allow[ed] that measure to apply to a nationwide class action." We denied the petition for review. Upon remand to the district court, BASF filed a second motion to decertify the class action. The district court denied that motion on September 11, 2001.

At trial, the jury was presented with a special verdict form and found by unanimous vote that BASF "engage[d] in an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's marketing and pricing strategies for Poast and Poast Plus herbicides" and "engage[d] in a knowing omission, suppression or concealment of the truth in relation to BASF's marketing and pricing strategies for Poast and Poast Plus." The jury also found that BASF's conduct or actions caused the farmers an ascertainable loss. At trial, the farmers had presented an expert witness who testified that based on the difference in price between Poast and Poast Plus and the number of gallons of Poast sold in the United States according to market survey data, actual damages for the years 1992 through 1996 should amount to $26,182,501. BASF presented its own expert who calculated the price differential of Poast and Poast Plus based on BASF's data, concluding that actual damages should amount to $7,251,417. The jury awarded the farmers actual damages totaling $15,000,000.

Pursuant to New Jersey law,[9] the district court trebled the damages and awarded prejudgment interest and attorney fees, entering a judgment totaling $52,058,931.51. The district court denied BASF's motion for JNOV and partial JNOV as to the damages awarded for the year 1992 and for the years 1995 and 1996.

The court of appeals affirmed the district court judgment. *Peterson v. BASF Corp.*, 657 N.W.2d 853 (Minn. App. 2003) ("*Peterson II*"). The court of appeals held that BASF was not entitled to JNOV or partial JNOV. *Id.* at 868, 870. The court of appeals also held, among the other issues, that FIFRA did not preempt the farmers' consumer fraud action and that BASF was not entitled to a new trial based on its contention that the district court failed to instruct the jury on critical elements of its defenses or its contention that the district court improperly admitted evidence. 657 N.W.2d at 865, 871, 872-73. Furthermore, the court of appeals held that BASF's challenge to the district court's denial of its motion to decertify the class and the district court's decision to apply New Jersey law to all of the claims was barred from appeal by the law of the case doctrine. *Id.* at 873. Regarding decertification of the class and choice of law, the court of appeals reasoned that it had decided class certification in *Peterson I*, the decision to apply New Jersey law was an underlying issue to class certification, and thus BASF was precluded from raising the issues before the court of appeals a second time. 657 N.W.2d at 873.

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[9] "In any action under [the NJCFA] the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under [the NJCFA], * * * the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit." N.J. Stat. Ann. § 56:8-19 (West 2002).

BASF petitioned us for review specifically on the following issues: (1) whether the U.S. Constitution and the *Milkovich* test[10] permit application of the NJCFA to the claims of a nationwide class; (2) whether federal law preempts the farmers' consumer fraud claims based on deceptive labeling; and (3) whether the verdict was tainted based on BASF's First Amendment rights. BASF also stated in its petition for review that "this appeal raises other legal issues, including causation, materiality, product safety, class propriety, ascertainable loss, patent preemption, the 'duty to market,' and evidentiary support for hotly disputed facts."

We granted review to address the "issues raised [by BASF] in the petition for further review," with the exception of BASF's First Amendment argument. In addition, we asked the parties to address: (1) whether law of the case principles preclude supreme court review of underlying issues pertaining to class certification; and (2) if law of the case principles do not preclude supreme court review of the underlying issues, whether the district court improperly certified the class.

I.

We begin by addressing the effect of the law of the case doctrine on this appeal. Law of the case is a rule of practice that once an issue is considered and adjudicated, that issue should not be reexamined in that court or any lower court throughout the case. *See Sigurdson v. Isanti County*, 448 N.W.2d 62, 66 (Minn. 1989); *L.K. v. Gregg*, 425 N.W.2d 813, 815 (Minn. 1988). The rule is not a limitation on the power of a court to reexamine an issue – it is "a rule of practice, not of substantive law." *Braunwarth v. Control Data Corp.*, 483 N.W.2d 476, 476 n.1 (Minn. 1992). While courts have the power to review and overrule their determination on

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[10] *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973).

a prior appeal in the same case, they typically do not do so as a matter of policy. *See, e.g., Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 720 (Minn. 1987). There are, of course, exceptions. When there has been a change in the law by a judicial ruling entitled to deference between appeals of the case, law of the case does not typically apply. *Brezinka v. Bystrom Bros., Inc.*, 403 N.W.2d 841, 843 (Minn. 1987); *Sands v. Am. Ry. Express Co.*, 159 Minn. 25, 26, 198 N.W. 402, 402 (1924). Similarly, when the evidence on which an appellate court based its prior decision is substantially different on the second appeal, law of the case does not preclude reconsideration. *Cayse v. Foley Bros., Inc.*, 260 Minn. 248, 253, 110 N.W.2d 201, 204 (1961).

The law of the case doctrine does not generally bar a higher court from reviewing an earlier decision of a lower court, although other interests such as finality and "encourag[ing] compliance with fair and efficient procedure" may weigh into the court's decision to exercise review. 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478.6 (2d ed. 2002); *accord Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from [the U.S. Supreme] Court's review."); *Dobrin v. Dobrin*, 569 N.W.2d 199, 201 (Minn. 1997) (acknowledging that the first court of appeals decision was the law of the case following denial of a petition for review and, as such, generally not subject to reexamination on a second appeal to the court of appeals, but nevertheless reviewing and reversing the first court of appeals decision). We therefore hold that even though the court of appeals adhered to the law of the case based on its earlier holding, the law of the case

doctrine does not preclude our review of issues decided by the court of appeals in *Peterson I.*

A separate issue, however, is the appropriateness of reviewing an issue that could have been raised in a prior appeal, but was not. The farmers argue that BASF is barred from challenging class certification and the application of New Jersey law to all the claims in the class because it failed to raise these issues in its petition for review to us following *Peterson I.* Rule 117 of the Minnesota Rules of Civil Appellate Procedure provides that a party seeking review of a decision by the court of appeals may petition the supreme court for discretionary review. The petition shall contain, among other things, "a statement of the legal issues sought to be reviewed, and the disposition of those issues by the Court of Appeals." Minn. R. Civ. App. P. 117, subd. 3(a). In order to facilitate fair and efficient judicial proceedings, matters that are ripe for review should be brought to the court's attention when submitting a petition for review.[11] In *Hoyt Investment*

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[11] As Wright, Miller & Cooper put it, in the context of a party failing to argue an issue when an appeal is actually taken:

> There are powerful reasons to insist that all matters ripe for review at the time an appeal is taken be presented for review or abandoned. Part of the price paid for the final-judgment rule is that trial-court proceedings may be tainted by an unappealable ruling and require expensive and time-consuming reconstruction after the opportunity for appeal finally becomes available. There is no reason to pay this price when there was an opportunity for review in the course of an appeal that was actually taken. Even when consideration of the matter on a later appeal would terminate all further proceedings, loss of the opportunity to terminate further proceedings at the time of the earlier appeal exacts a cost. These considerations, however, are a function of efficient relationships between appellate courts and trial courts, not law of the case. The solid explanation is the common ex-

Co. v. Bloomington Commerce & Trade Center Associates, 418 N.W.2d 173 (Minn. 1988), we addressed an appellant's failure to appeal an issue to the supreme court. We noted that the Rules of Civil Appellate Procedure "impose[ ] upon counsel the obligation to state with specificity in their respective briefs the precise nature of the relief sought from the appellate court." *Id.* at 175. "In their petition for further review from the original court of appeals' decision, [the appellants] could have and should have brought the error to [our] attention." *Id.* at 176. When submitting a petition for review, a party should bring issues ripe for review to the supreme court's attention with specificity, or waive the opportunity to have them reviewed.

Accordingly, in this case, we must first determine whether BASF's arguments on class certification and choice of law were ripe for review following the court of appeals' decision in *Peterson I*. The procedural background of this case and the nature of class certification may make this case practically unique. The district court certified the nationwide class in part because of the common nature of the claims that could be brought under the NJCFA. The court denied BASF's subsequent motion to decertify the class, but granted BASF's motion for summary judgment in the same order. After the farmers appealed the grant of summary judgment, BASF appealed separately to the court of appeals, specifically challenging the orders granting class certification and denying decertification of the class. BASF argued that class certification was inappropriate because a detailed choice of law analysis was in order using Minnesota's "significant contacts" test, set forth in *Milkovich v. Saari*, 295 Minn. 155,

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planation of forfeiture – procedural efficiency depends on reliable sanctions.

18B Wright, Miller & Cooper, *supra*, § 4478.6 (footnotes omitted).

203 N.W.2d 408 (1973), and because different states' consumer protection laws required those laws to be applied wherever Poast and Poast Plus were purchased or applied. The court of appeals affirmed the district court's certification of the class, but did not conduct a choice of law analysis. *Peterson I*, 618 N.W.2d at 826. Following our denial of review, BASF again moved the district court to decertify the class, asserting that it was unconstitutional to apply the NJCFA to all the claims of the case and that a *Milkovich* choice of law analysis was required. The district court denied that motion.

Based on this procedural history, we conclude that BASF's arguments on class certification, decertification, and choice of law in a nationwide class were ripe for review following the court of appeals' decision in *Peterson I*. BASF specifically filed a notice of review with the court of appeals on class certification and decertification. These issues could have been raised in BASF's petition for review to us following *Peterson I*. BASF argues that the constitutionality and appropriateness of applying the NJCFA are "distinct" issues, which would not have been ripe for review following *Peterson I*. However, BASF has consistently argued the constitutionality of applying the NJCFA and the need to conduct a detailed choice of law analysis in the context of class certification and decertification. These arguments were made to the court of appeals in *Peterson I* and the same arguments were made in BASF's motion to the district court to decertify the class following *Peterson I*. Choice of law and the constitutionality of applying a state's law were underlying issues to BASF's arguments on class certification and decertification.

Moreover, because a determination on class certification is so important to a class action, a determination as to whether a class action can be maintained should be made as soon as practicable. *Cf.* Minn. R. Civ. P. 23.03(a) ("As soon as practicable after the commencement of an action brought

as a class action, the court shall determine by order whether it is to be so maintained."). Class certification and choice of law are legal issues and would have been appropriate on a petition for review following *Peterson I*. For strategic purposes, presumably, BASF chose instead to raise these issues with the district court in the context of a decertification motion. As a result, we conclude that the district court's decisions to apply New Jersey law to all the claims in this case, as well as BASF's challenge to class certification, were ripe for review by the supreme court following the court of appeals' decision in *Peterson I*.

BASF argues additionally that it raised the application of New Jersey law and class certification in its petition for review following *Peterson I*. We disagree. In its petition for review, BASF raised two issues: whether as a matter of law BASF's actions could have violated the NJCFA and whether as a matter of law there was an ascertainable loss leading to measurable damages, with *Peterson I* "allow[ing] that measure to apply to a nationwide class action." BASF argues that it raised the class certification issue "as it then existed." However, it is clear that BASF was only petitioning us to consider whether BASF's actions violated the NJCFA and on damages issues. In BASF's petition for review following *Peterson I*, it failed to even mention class certification, decertification, or the need for a *Milkovich* analysis, except to say in passing in the very last sentence of its argument in support of petition that "the lower court without discussion imposed its new damages rule on a New Jersey statute and improperly projected the rule onto a nationwide class." We conclude that BASF failed to raise with specificity class certification, decertification, and its choice of law argument to us following *Peterson I*.

Since BASF's petition for review following *Peterson I*, there have not been any significant changes in the law or in the facts of the case that would make review of class certifi-

cation or decertification any different now than it would have been when BASF first petitioned us for review.[12] BASF argues that the law has changed because the U.S. Supreme Court's recent decision in *State Farm Mutual Insurance Co. v. Campbell* held that it was a violation of due process to award punitive damages in large proportion relative to compensatory damages. 538 U.S. 408 (2003). However, BASF is incorrect that *State Farm* prohibits the application of the NJCFA to this case. *State Farm* dealt with excessive punitive damages as a violation of due process and had nothing to do with class certification or choice of law in a class action certification.

Based on the unique procedural history of this case, we conclude that consideration of BASF's arguments on class certification and the decision to apply New Jersey law to all the claims in the class in this appeal would undermine principles of fairness and judicial economy. BASF failed to raise these issues when they were ripe for review following *Peterson I*. We therefore hold that BASF waived its opportunity to have these issues considered by us and we will not address them in this appeal.

II.

We next consider BASF's contention that federal law preempts the farmers' consumer fraud claims. BASF argues that the farmers' claims were preempted (1) because FIFRA and EPA regulations prohibit any claim that Poast and Poast Plus are the same product and (2) because FIFRA's labeling

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[12] Unlike the facts before us in *Ario v. Metropolitan Airports Comm'n*, 367 N.W.2d 509 (Minn. 1985), where we held that a denial of class certification was not law of the case because the class was drastically different, nothing in the record here indicates that the class is any different than it was following *Peterson I*; thus, we are not presented with a case of substantial changes to the class.

provisions preempt what BASF describes as an attack on the content of the Poast and Poast Plus labels. Preemption is a question of law, which we review de novo. *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002).

To begin with, we disagree with BASF's first argument – that the claims in this case are preempted because the central foundation of the farmers' claims is the assertion that under state law Poast and Poast Plus are the same product. The farmers' NJCFA claims were based on alleged unconscionable commercial conduct with regard to EPA-authorized uses of the products. Although evidence was presented that Poast and Poast Plus are essentially the same product – for example, evidence showed that Poast and Poast Plus contain the same amount of active ingredient, sethoxydim, per acre – this evidence was presented to illustrate what the farmers alleged was a scheme to exploit the farmers through consumer fraud. The farmers' consumer fraud claim was not based on Poast and Poast Plus being the same product, but rather on BASF violating the NJCFA by making misrepresentations about the products, which included providing as relevant evidence the fact that they contained the same active ingredient and were EPA approved for use on the same crops.

BASF's second argument, that FIFRA's labeling provisions preempted the farmers' claims, requires us to address FIFRA preemption in more detail. Federal preemption of state law is determined by examining congressional intent. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38 (1990). When Congress has included an express provision in the statute that provides a reliable indication of congressional intent, there is no need to imply Congress' intent. *Kuiper v. Am. Cyanamid Co.*, 131 F.3d 656, 661-62 (7th Cir. 1997). Such a provision is present in FIFRA. *See Kuiper*, 131 F.3d at 661-62. FIFRA expressly provides that a state "may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation

does not permit any sale or use prohibited by this subchapter." 7 U.S.C. § 136v(a) (2000). Further, a state "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b) (2000).

It is well established that FIFRA preempts state actions relating to labeling and packaging.[13] *See, e.g., Kuiper*, 131 F.3d at 663 (holding that a products liability action based on off-label misrepresentations, which essentially repeated the information/restrictions found on a herbicide's label, was preempted under FIFRA). Courts have also found that state law claims "'*premised* on inadequate labeling or a failure to warn,' which result[ ] in the imposition of additional or different labeling requirements" are preempted "regardless of the guise under which the claim[s][are] presented." *Netland v. Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir. 2002) (holding that a state action based on defective design was preempted because the premise of each claim was the pesticide manufacturer's label) (quoting *Nat'l Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 608 (8th Cir. 1999)); *ac-*

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[13] In *Goeb v. Tharaldson*, 615 N.W.2d 800, 817 (Minn. 2000), we analyzed the issue of FIFRA preemption with regard to common law tort actions arising out of injuries after exposure to insecticides. We reiterated the finding that courts "uniformly hold that FIFRA preempts claims relating to labeling and packaging of federally-registered pesticides" and therefore held that FIFRA preempted the plaintiffs' claims dealing with "failure to warn" and "inadequate labeling." *Id.* We also addressed plaintiffs' claims of negligent misrepresentation and negligent testing of products, finding that "claims of negligent misrepresentation and negligent testing [were] not preempted by FIFRA." *Id.* at 819. These negligent misrepresentation claims centered around "the EPA registration process." *Id.* at 818. We did not thoroughly evaluate the misrepresentation issue, however, because the plaintiffs in *Goeb* did not petition for review of these claims. *See id.* at 818-19.

cord Worm v. Am. Cyanamid Co., 5 F.3d 744, 747-48 (4th Cir. 1993) (concluding in the context of state law defective design actions that one factor to consider in resolving the preemption issue is whether one could reasonably foresee that the manufacturer, in seeking to avoid liability for the error, would choose to alter the product or label). In *Mortellite v. Novartis Crop Protection, Inc.*, the federal district court for the District of New Jersey recently addressed FIFRA preemption in the context of a NJCFA claim. 278 F. Supp. 2d 390 (D.N.J. 2003). In *Mortellite*, blueberry farmers sued the manufacturer of an insecticide for consumer fraud, alleging that false marketing statements in brochures about product safety caused them to use the product in a dangerous manner. *Id.* at 393. The court found that "[w]hen advertising or promotional materials merely repeat information or language contained on the label, claims directed at the advertising necessarily challenge the label itself and are therefore preempted." *Id.* at 401. The court classified the plaintiffs' NJCFA claim as a negligent failure to warn claim and found it to be preempted. *Id.*

In the matter before us, the farmers argue that their consumer fraud claim is not based on BASF's labels but rather on fraudulent marketing techniques. The court of appeals agreed. It held that "the farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging." *Peterson II*, 657 N.W.2d at 865. Further, the court of appeals noted that "the farmers here were not asserting that BASF's registration and container labels were false or misleading, * * * [r]ather, the farmers' point was that *even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops * * *." *Id.*

We agree with the court of appeals. Although evidence was presented at trial based on statements derived from the Poast and Poast Plus labels, the farmers' claims of unconscionable commercial conduct derived from statements and actions that went beyond the label. For example, the farmers presented evidence that BASF advertised Poast Plus as only "registered" for use on cotton, soybeans, peanuts, and alfalfa, and advertised that Poast was the "only" post-emergent grass herbicide registered for use on minor crops, which a BASF executive candidly admitted was a material omission. Additionally, BASF attempted to prevent word from spreading that Poast Plus was registered for use on minor crops. A BASF sales representative informed authorities that farmers were using Poast Plus on minor crops, BASF had its public relations firm submit a magazine article discussing increased enforcement of fines for failing to follow label recommendations, and BASF told the North Dakota Department of Agriculture that BASF could not add crops on the Poast label to the Poast Plus label because the EPA would require it to do further residue testing, which would cost the company millions of dollars. BASF's alleged unconscionable conduct went beyond the label and the reach of federal law. As an EPA representative stated in correspondence with the North Dakota Commissioner of Agriculture, the "problem appears to stem from a company marketing decision in which the EPA had no input." This differs from *Mortellite* where the representations made in the brochures complained of "merely repeat[ed] information or language contained on the label." 278 F. Supp. 2d at 401; *accord Anderson v. Dow Agrosciences LLC*, 262 F. Supp. 2d 1280, 1291 (W.D. Okla. 2003) (holding claims based on off-label statements by the representatives of a herbicide manufacturer were not preempted).

Moreover, under the *Worm* analysis, the issue is "whether one could reasonably foresee that the manufacturer, in seek-

ing to avoid liability for the error, would choose to alter the product or label." *Worm*, 5 F.3d at 747-48; *see also Gooch v. E.I. Du Pont de Nemours & Co.*, 40 F. Supp. 2d 863, 873 (W.D. Ky. 1999) (stating the analysis as "if [a] manufacturer could avoid liability by altering the label, then FIFRA preempts the claim giving rise to that liability."). That is not the case here. BASF argues that it could not have altered the label because it did not seek state registration of Poast Plus for all the crops for which Poast was state registered. But, the "problem," as an EPA representative called it, was BASF's failure to seek state registration for Poast Plus on all the crops, and more to the point for consumer fraud purposes, BASF's repeated, published, and planned misrepresentations about Poast Plus' EPA registration. It was these actions that the farmers allege amounted to consumer fraud. Accordingly, we affirm the court of appeals and hold that the farmers' NJCFA claims were not preempted by FIFRA.

III.

Lastly, we address BASF's argument that it is entitled to JNOV because the farmers did not establish any actionable conduct, did not prove a sufficient causal nexus between BASF's actions and any injury suffered, and did not prove that the farmers suffered an "ascertainable loss" as required by the NJCFA. *See* N.J. Stat. Ann. 56:8-19. Where the district court has denied a motion for JNOV, we review the issue de novo. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). However, if there is "any competent evidence reasonably tending to sustain the verdict," we do not set the verdict aside. *Id.* On a motion for JNOV, a court must consider whether viewing the evidence in the light most favorable to the nonmoving party, (1) the verdict is manifestly against the entire evidence or (2) whether despite the jury's findings of fact, the moving party is entitled to judgment as a matter of law. *Id.*

A. Liability

The NJCFA makes illegal "any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise * * *." N.J. Stat. Ann. 56:8-2. In general, the NJCFA has three categories of unlawful practices: affirmative acts, knowing omissions, and regulatory violations. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 647 A.2d 454, 462 (1994). Two of those three categories are relevant to this case – affirmative acts and knowing omissions – and are examples of what the NJCFA defines as "unconscionable" conduct. *Byrne v. Weichert Realtors*, 290 N.J. Super. 126, 675 A.2d 235, 240 (1996). "Unconscionable commercial practice" in this context is "an amorphous concept obviously designed to establish a broad business ethic." *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640, 651 (1971). "The standard of conduct that the term 'unconscionable' implies is lack of 'good faith, honesty in fact and observance of fair dealing.'" *Cox*, 647 A.2d at 462 (quoting *Romain*, 279 A.2d at 652). Proof of any act or omission as specified by the statute is sufficient to establish unlawful conduct under the NJCFA. *Cox*, 647 A.2d at 462.

BASF argues that the evidence presented did not lead to a "connection with the sale or advertisement of any merchandise." N.J. Stat. Ann. 56:8-2. However, evidence was presented that BASF made material misrepresentations in advertisements. Moreover, the *Sugarbeet Grower* magazine article, efforts by BASF's sales representative to have off-label restrictions enforced, and BASF's less than candid responses to inquiries about Poast Plus' EPA registration showed efforts to prevent farmers from learning that Poast Plus was EPA approved for use on the same crops as Poast. Given the "broad business ethic" that the NJCFA is designed

to create, *Romain*, 279 A.2d at 651, there was competent evidence reasonably tending to sustain the verdict on liability.

B. Causation & Ascertainable Loss

BASF also would be entitled to JNOV if the farmers failed to establish that BASF's actions caused an ascertainable loss. *See Cox*, 647 A.2d at 464. To establish a violation under the NJCFA, a "causal relationship" must exist between the ascertainable loss and the unlawful practice. *Roberts v. Cowgill*, 316 N.J. Super. 33, 719 A.2d 668, 672 (1998). The NJCFA provides that an offense arises "whether or not any person has in fact been misled, deceived or damaged thereby." N.J. Stat. Ann. 56:8-2. Consumer fraud in New Jersey, in contrast with common law fraud, does not require a showing of reliance, merely a "causal relationship."[14] *Cox*, 647 A.2d at 464.

BASF argues that the farmers failed to prove BASF's actions caused an ascertainable loss because they failed to show that either they or other class members were ever aware of BASF's statements about Poast and Poast Plus and because the farmers' theory of causation, which BASF terms the "lost opportunity to boycott" Poast, is unsupportable as a matter of law. In *Peterson I*, the court of appeals held that a causal link between BASF's conduct and an ascertainable loss could be established based either on (1) the farmers' lost opportunity to choose whether to buy Poast or the lower-priced Poast

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[14] The jury was given the following instruction on causation:

> The basic question for you to resolve is whether the injury Plaintiffs claim are so connected with a violation of the New Jersey Consumer Fraud Act by BASF that you decide it is reasonable that Defendant should be held responsible for the injury.

Plus,[15] or (2) the lost opportunity to refuse to buy Poast if they had known that Poast Plus was EPA registered for the same uses as Poast. 618 N.W.2d at 824-25. In *Peterson II*, the court of appeals held that sufficient evidence had been presented at trial for a jury to find an ascertainable loss based on the farmers' lost opportunity to refuse to purchase Poast due to BASF's conduct or actions. 657 N.W.2d at 868.

The farmers' theory of causation is based on unconscionable commercial activities resulting in the farmers purchasing Poast, which had a weighted average price differential of approximately $4 per acre more than Poast Plus. In *Varacallo v. Massachusetts Mutual Life Insurance Co.*, the appellate division of the New Jersey Superior Court held that plaintiffs who purchased whole life insurance policies from an insurer met the requirements for class certification where plaintiffs alleged a knowing omission of material information under the NJCFA. 332 N.J. Super. 31, 752 A.2d 807, 817-19 (2000). The court stated that if the plaintiffs succeeded in showing that the insurance company withheld material information in literature with the intent that consumers would rely on it in purchasing an insurance policy, the purchase of the policy by a person who was shown the literature would

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[15] The court cited to a Minnesota case, *Sutton v. Viking Oldsmobile Nissan, Inc.*, 611 N.W.2d 60, 65 (Minn. App. 2000), as the basis for this "lost opportunity to buy" theory. *Sutton* was later vacated by this court and remanded to the court of appeals to consider in light of our decision on the Minnesota Consumer Fraud Act in *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001). *Sutton v. Viking Oldsmobile Nissan, Inc.*, 623 N.W.2d 247, 247 (Minn. 2001). On remand, the court of appeals held that a genuine issue of material fact existed as to whether Sutton was damaged, neither affirming nor denying its prior reasoning. *Sutton v. Viking Oldsmobile Nissan, Inc.*, No. C2-99-1843, 2001 WL 856250 at *2 (Minn. App.), *rev. denied* (Minn. Oct. 24, 2001).

be sufficient to establish prima facie proof of causation because the NJCFA requires only a causal relationship, not reliance. *Id.* at 817.

Here, named plaintiffs, as representatives of the class of similarly situated farmers, testified that they had seen the allegedly misleading advertisements. The jury could infer from the advertisements and other evidence that but for BASF's unconscionable conduct, farmers in general would have discovered that Poast Plus was EPA registered for use on the same crops as Poast. Under the NJCFA, class members' awareness of advertisements may provide a sufficient causal nexus. *See Varacallo*, 752 A.2d at 817. The farmers also presented evidence that BASF's sales documents showed that around 1996, when BASF's actions were exposed to the public, sales for Poast in North Dakota, Minnesota, and elsewhere dropped off. Similarly, the farmers provided evidence that the price of Poast decreased around 1996-97. The farmers argued that BASF's actions from 1992 to 1996 made them unaware that Poast Plus was EPA approved for use on the same crops as Poast, and had this been known, pressure would have been placed on BASF to lower the price of Poast to the more competitive market price of Poast Plus. For example, the farmers could have refused to purchase Poast, or states could have issued special local needs registrations pursuant to FIFRA section 24(c) to allow for the use of Poast Plus on minor crops. The jury could infer from the evidence that BASF's actions had a "causal relationship" with the farmers purchasing Poast, which resulted in them suffering a loss.

Furthermore, the farmers' loss was ascertainable. Our review of the evidence presented leads us to conclude that the underlying economic facts of the case were not seriously in dispute. Both sides presented expert testimony on damages. The farmers claimed actual damages of $26,182,501 and the

jury awarded the farmers $15,000,000 in actual damages.[16] BASF argued damages by introducing demonstrative trial exhibits and presenting an expert witness who estimated potential liability per acre. BASF's final damage figures varied from the figures presented by the farmers,[17] but once the jury determined BASF's liability, the evidence of an ascertainable loss by measurable money damages was clear. *See Cox*, 647 A.2d at 464 (holding an ascertainable loss existed where unlawful practice committed by failing to have periodic inspections in a home repair contract caused unsafe wiring and unattractive cabinets, which loss could be measured by repairing those conditions). The actual damage award was a factual determination by the jury.

We conclude there was competent evidence in the record reasonably tending to sustain the verdict when the evidence is viewed in the light most favorable to the nonmoving party. A judgment in favor of BASF as a matter of law would not be appropriate and the verdict was not manifestly against the weight of the entire evidence of liability, causation, and as-

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[16] The jury was instructed on damages and ascertainable loss of money and further that "the price charged is only one factor in your consideration * * *." The jury was also instructed that the damage award would be trebled and reasonable attorney fees would be awarded pursuant to New Jersey law.

[17] We note, though, that the Director of Coastal Business Area for BASF submitted an affidavit stating that he had reviewed sales records for the sale of Poast and Poast Plus for the period 1992-1996 and determined that the weighted average price differential between the two products for that period was approximately $4 per acre. This price differential is close to the price differential used by the farmers' expert, illustrating that the underlying economic facts were not seriously in dispute. BASF's damage expert estimated the farmers' actual damage at $7,251,417.

certainable loss. We affirm the court of appeals and hold that BASF is not entitled to JNOV.

Affirmed.

PAGE, J., took no part in the consideration or decision of this case.

Court of Appeals of Minnesota.

RONALD PETERSON, ET AL.,
Respondents,

v.

BASF CORPORATION, *a foreign corporation*,
Appellant.

No. C3-02-857.

March 11, 2003.

Considered and decided by HUDSON, Presiding Judge, SCHUMACHER, Judge, and G. BARRY ANDERSON, Judge.

OPINION

HUDSON, Judge.

In this nationwide class action under the New Jersey Consumer Fraud Act, appellant BASF Corporation argues that: (a) it is entitled to judgment notwithstanding the verdict (JNOV) on the jury's determination that it engaged in consumer fraud; (b) it is entitled to JNOV on the verdict for damages as to the years 1992 and 1995-96; (c) it is entitled to a new trial based on errors in jury instructions and the improper admission of evidence; and (d) the district court improperly certified the class. Respondent farmers filed a notice of review challenging district court determinations as to prejudgment interest and moved to strike portions of BASF's brief. Eight amici filed briefs. We affirm and grant the motion to strike in part.

FACTS

Respondents, farmers who purchased the herbicide Poast from New Jersey-based BASF Corporation from 1992 to 1996, brought a class action against BASF under the New Jersey Consumer Fraud Act (NJCFA), N.J. Stat. Ann. § 56:8-

2 (West 2001). The action was based on the claim that BASF had defrauded thousands of American farmers by marketing its herbicide as two separate products, Poast and Poast Plus, for different uses at different prices through a "system of deceit." *Peterson v. BASF Corp.*, 618 N.W.2d 821, 824 (Minn. App. 2000), *review denied* (Minn. Jan. 26, 2001).

Poast and Poast Plus are post-emergence grass herbicides that contain the same active ingredient, sethoxydim. Sethoxydim was invented, patented, and manufactured by Nippon Soda Company of Japan. Nippon licensed the molecule to BASF, which first used it to develop Poast.

BASF began the regulatory process to register Poast with the EPA in the late 1970s and early 1980s. The biggest hurdle to obtaining EPA registration was establishing the acceptable residue tolerance and determining whether the herbicide would leave a residue on the crops or pose a risk in food. BASF complied with these and other requirements and obtained EPA registration for Poast around 1982 for a large number of both major and minor crops.[1]

By 1983, BASF had registered Poast with the individual states, labeled it for use on major crops, and began marketing the product. It proved to be both safe and highly effective in controlling weeds that were grasses. In contrast, earlier herbicides marketed for this purpose were not consistently effective, and the only other alternative, weeding by hand, was expensive. As word spread, both BASF and state agriculture

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[1] "Major crops" such as soybeans, corn, and cotton are farmed on millions of acres of land but provide a relatively low financial return per acre. "Minor crops" include varied crops such as sugarbeets, vegetables, grapes, citrus fruits, and berries that are farmed on far fewer acres but bring farmers a much higher profit per acre.

departments received requests to use Poast on minor crops. BASF decided to enter the minor crop market and conducted additional efficacy and phytotoxicity testing. By about 1985, it began introducing the product into the minor crop market. Because the 1982 EPA registration already included these minor crops, BASF did not need to obtain any additional EPA approval, although it had to obtain state registrations and change the product label.

Meanwhile, BASF had been developing Poast Plus. When using Poast, the farmers had to add crop oil, an adjuvant, to the herbicide to ensure that it spread and penetrated the leaves properly. With Poast Plus, BASF included adjuvants in the solution sold to farmers. In 1992, BASF obtained EPA registration for Poast Plus for the same major and minor crops for which Poast was already registered. Because Poast and Poast Plus contain the same active ingredient – sethoxydim – and are applied at the same rate, the tolerances established for Poast applied to Poast Plus and no new residue testing was required. The Poast and Poast Plus labels registered with the EPA are identical and cover the same major and minor crops. BASF, however, obtained state registrations and labeled Poast Plus for use only on four major crops: soybeans, cotton, peanuts, and alfalfa. Further, it marketed Poast Plus at a lower price than Poast. Thus, minor-crop farmers could only purchase Poast at the higher price, while major-crop farmers could purchase Poast Plus at a lower price.

The farmers' lawsuit was based on the claim that in its marketing, BASF fraudulently concealed and omitted that the less expensive Poast Plus was registered with the EPA for use on the same minor crops as the more expensive Poast. The jury heard extensive testimony on the issue of whether Poast and Poast Plus were the same products or not. BASF introduced evidence that the products had different chemical formulas because they contained different inert ingredients

and that they had different tank-mix capabilities. In addition, witnesses for BASF testified that Poast Plus was "hotter" than Poast, leading to the possibility of increased crop risk and risk of skin irritation. BASF also noted that Poast Plus is separately patented as a unique product, and that because of their chemical differences, the EPA required BASF to register the products separately and give them different names.

The farmers offered evidence that the products are the same: Poast and Poast Plus are EPA-registered for the same major and minor crops; Poast and Poast Plus are based on the same residue data; and Poast and Poast Plus contain the same active ingredient, sethoxydim. The products control the same weed grasses using the same number of applications, pounds of active ingredient per acre, and time of application. The farmers also asserted that BASF used deceptive formulations of the same product, in order to lead the farmers to believe that Poast was more expensive because it contained more sethoxydim, when the products were the same. They also produced testimony explaining or disputing BASF's claims as to the effect of the different inert ingredients and other distinctions between the products.

The jury also heard evidence as to the fraudulent acts and omissions of which the farmers accused BASF. The farmers showed that BASF engaged in an advertising campaign claiming that only Poast was registered with the EPA for minor crops, despite the fact that Poast Plus was EPA-registered for the same minor crops. Other evidence showed that BASF used mailings to food processors and dealers, an article submitted to The Sugarbeet Grower magazine, and a position paper emphasizing the dangers of "off-label" use, despite the fact that Poast Plus had been approved for minor crops. In another strategy, BASF turned in its own dealers to the North Dakota agriculture inspectors for selling Poast Plus to minor-crop farmers in violation of state pesticide laws, leading to criminal prosecutions of dealers and farmers. Further, the

farmers introduced evidence to show that BASF personnel lied to the North Dakota Pesticide Control Board to conceal the fact that Poast Plus was EPA-registered for the same crops as Poast. Once the board learned from EPA officials that this was merely a marketing strategy, North Dakota, as well as South Dakota, obtained so-called "rule 24(c)" special local needs registrations with the EPA, allowing their farmers to use Poast Plus on minor crops.

The jury returned a verdict finding that BASF violated the NJCFA and that the violations caused ascertainable losses to the farmers in the years 1992 to 1996. The jury awarded damages of $15,000,000. The district court trebled the damages and added prejudgment interest and attorney fees. After denial of posttrial motions, BASF appealed. Respondents filed a notice of review and filed motions to strike portions of BASF's brief with this court.

ISSUES

I. Is BASF entitled to JNOV as to the jury determination that it violated the New Jersey Consumer Fraud Act?

II. Is BASF entitled to JNOV as to damages awarded for 1992 and 1995 to 1996?

III. Is BASF entitled to a new trial based on errors in jury instructions and improper admission of evidence?

IV. Did the district court improperly certify the class?

V. Were the damages readily ascertainable such that prejudgment interest should be awarded as of the date of their accrual and should prejudgment interest be awarded on the trebled damages?

ANALYSIS

I

BASF first contends that it is entitled to JNOV because as a matter of law it did not violate the New Jersey Consumer Fraud Act (NJCFA), N.J. Stat. Ann. 56:8-2 (West 2001). In addressing this claim, we are guided by the standard of review for an order denying JNOV as well as the law-of-the-case doctrine. First, an appellate court will review the evidence in the light most favorable to the verdict. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). If the verdict "can be sustained on any reasonable theory of the evidence" the denial of JNOV will be affirmed; it will be set aside only if "the evidence is practically conclusive against" it. *Id.* (citation and quotation omitted). The appellate court "may not weigh the evidence or judge the credibility of the witnesses." *Lamb v. Jordan*, 333 N.W.2d 852, 855 (Minn. 1983) (citation omitted). The grant or denial of a motion for JNOV is a question of law reviewable de novo. *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 14 (Minn. 1979).

The second consideration addresses the fact that this court has already resolved certain issues in an earlier appeal from summary judgment. *Peterson v. BASF Corp.*, 618 N.W.2d 821 (Minn. App. 2000) (*Peterson I*), *review denied* (Minn. Jan. 26, 2001). In such an instance, those issues become "the 'law of the case' and may not be relitigated in the trial court or re-examined in a second appeal." *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 503 N.W.2d 793, 795 (Minn. App. 1993) (citations omitted), *review denied* (Minn. Sept. 30, 1993). Issues not resolved in the first appeal may, of course, be considered in the second appeal. *Id.*

Finally, we note that we have considered arguments by amici. We note that an amicus may not raise an issue not addressed by the parties. *Country Joe, Inc. v. City of Eagan*,

560 N.W.2d 681, 687 n.7 (Minn. 1997). To the extent amici do so, we do not consider those arguments.

The NJCFA is aimed "at unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate." *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 390 A.2d 566, 568 (1978) (quoted in *Peterson I*, 618 N.W.2d at 823). It was intended to "give New Jersey one of the strongest consumer protection laws in the nation." *Cox v. Sears Roebuck Co.*, 138 N.J. 2, 647 A.2d 454, 460 (1994) (quotation omitted). The law provides for a private cause of action and authorizes treble damages, attorney fees, and costs. N.J. Stat. Ann. 56:8-19 (West 2001). It is to be construed liberally in favor of the consumer. *Cox*, 647 A.2d at 461.

"The capacity to mislead is the prime ingredient of all types of consumer fraud." *Id.* at 462 (citation omitted). To show a violation of the act, there must be evidence that the person committed an unlawful practice within the meaning of the act. *Id.* There are three general categories of unlawful practices under the act, two of which are relevant here: affirmative acts and knowing omissions. *See id.* (describing the three categories as affirmative acts, knowing omissions, and regulation violations). Such practices may be unlawful "even if no person was in fact misled or deceived thereby." *Id.* (citations omitted); N.J. Stat. Ann. 56:8-2 (West 2001). Affirmative acts include "[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, [or] misrepresentation." N.J. Stat. Ann. 56:8-2. "[I]ntent is not an essential element [of such an affirmative act] and the plaintiff need not prove that the defendant intended to commit an unlawful act." *Cox*, 647 A.2d at 462 (citation omitted). Knowing omissions include "the knowing concealment, suppression, or omission of any material fact." N.J. Stat. Ann. 56:8-2. Intent is an essential element of this category, requir-

ing proof that the defendant acted knowingly with intent that another rely on such concealment, suppression, or omission. N.J. Stat. Ann. 56:8-2; *Cox*, 647 A.2d at 462.

After showing that an unlawful practice occurred within the meaning of the act, the plaintiff must show that the unlawful consumer fraud caused an ascertainable loss. *Cox*, 647 A.2d at 464-65. Finally, the plaintiff must show that the loss was the result of the unlawful conduct. *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 541 A.2d 1063, 1067 (1988).

BASF contends it is entitled to JNOV on three grounds. First, it asserts that it did not violate the NJCFA as a matter of law because it has shown: that Poast and Poast Plus are not identical products; that federal law preempts a private cause of action based on alleged abuse of the pesticide regulations; and that, in any event, it proceeded lawfully. Second, it contends that the farmers' theories of causation fail as a matter of law. Finally, it charges that the farmers failed to establish a causal link between BASF's allegedly unlawful acts and an ascertainable loss. We review these arguments under the very narrow standard of review for JNOV, and we consider as well whether this court has already ruled on these issues in *Peterson I*.

New Jersey Consumer Fraud Act (NJCFA)

We first address BASF's claim that it is entitled to JNOV because as a matter of law it did not violate the NJCFA. It argues that it showed as a matter of law that Poast and Poast Plus are not "identical," citing, among other things, the different chemical formulas and patents of the two products. Consequently, it contends that the farmers' claim that it defrauded them by marketing one herbicide as two different products, Poast and Poast Plus, cannot stand. We must determine whether, under the standard for JNOV, the evidence is conclusive against the verdict or whether it can be sus-

tained on any reasonable theory of the evidence. *See Pouliot*, 582 N.W.2d at 224.

The issue of whether Poast and Poast Plus were the same herbicide was hotly contested throughout the four-week trial and many witnesses, including farmers, BASF executives, experts, and others, testified on the topic. While BASF contends that the evidence shows conclusively that the products were not the same, testimony was introduced to explain or contradict BASF's evidence. For example, BASF contended that the products have different chemical formulas, ingredients, and concentrations of solvent. The farmers' witnesses explained that the products – although seeming to contain different amounts of sethoxydim – deliver the same amount of this active ingredient when applied according to directions. Witnesses also offered different opinions as to the effect of the inert ingredients. Further, the farmers cite the evidence that Poast and Poast Plus are approved by the EPA for the same crops, based on the same residue data. They control the same weed grasses, using the same number of applications, pounds of active ingredient per acre, and time of application.

The jury was presented with conflicting evidence as to whether the products were the same, and the jury was also presented with explanations as to why seeming differences were not significant. Although another fact-finder might have reached a different result, the jury clearly had evidence from which it could conclude that Poast and Poast Plus were the same product, and we will not substitute our judgment for that of the jury.

Preemption

BASF next argues that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136a (2000), under which EPA registration is required, preempts private causes of action based on alleged abuse of pesticide regulations. It

contends that, in any event, it proceeded legally under these provisions.

The farmers moved to strike this claim, contending that this court has already considered and rejected this argument in *Peterson I*. A careful reading of *Peterson I*, however, shows that this court did not explicitly address preemption; therefore, we will do so here. *Peterson I*, 618 N.W.2d at 824.

Pesticides are subject to federal regulation. 7 U.S.C. 136a(a). "[S]tate[s] shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required" by federal law. *Id.* 136v(b) (2000). Common-law tort actions have been interpreted to constitute such forbidden requirements. *Goeb v. Tharaldson*, 615 N.W.2d 800, 817 (Minn. 2000). Consequently, federal courts "uniformly hold that FIFRA preempts claims relating to labeling and packaging of federally-registered pesticides." *Goeb*, 615 N.W.2d at 817 (citations omitted).

BASF cites several recent federal cases that it contends support its claims of preemption. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 353 (2001) (holding fraud-on-the-agency claims preempted); *Kimmel v. DowElanco*, 275 F.3d 1199, 1206 (9th Cir. 2002) (holding that where allegations of fraud on the EPA and abuse-of-labeling process give rise to party's intentional-interference-with-prospective-business-advantage claim, claim is preempted); *Dahlman Farms, Inc. v. FMC Corp.*, 240 F. Supp. 2d 1012 (D. Minn. 2002) (holding consumer-fraud claims based on label and off-label statements that were essentially the same were preempted).

In *Buckman*, the Supreme Court held that federal law preempts the state law claim where "the existence of these federal enactments is a critical element." 531 U.S. at 353. BASF contends that the farmers' regulator-abuse claims likewise make the federal regulations a "critical element."

But in *Buckman*, the claims existed "solely by virtue of the FDCA disclosure requirements." *Id.* Here, the farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on claims that BASF committed fraud in the labeling or packaging.

BASF's reliance on *Dahlman Farms* is similarly misplaced. There, Dahlman's corn crop was damaged after he applied defendant's herbicide pursuant to the label instructions and following assurances from the defendant's salesmen that the herbicide was safe for use on seed corn crops. *Id.* at 1014-15. Dahlman sued under Minnesota's consumer fraud statute claiming, among other things, that the defendant committed consumer fraud by making off-label statements in its advertising that misrepresented the efficacy of the product. *Id.* at 1020-21. The trial court held that Dahlman's claims were preempted because the off-label advertising statements concerning the efficacy of the product were essentially the same as the statements on the label itself – both indicated that the product was safe for use on seed corn crops. *Id.*

Dahlman Farms does not further BASF's cause. Again, the farmers here were not asserting that BASF's registration and container labels were false or misleading, which was the heart of the *Dahlman Farms* consumer fraud claim. Rather, the farmers' point was that *even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops, when, in fact, it was EPA-registered for both major and minor crops. Consequently, the farmers' claims are not preempted.

Next, BASF notes that federal regulations permit "subset labeling," that is, labeling of a pesticide for fewer than all of the uses for which it is EPA-registered. Thus, BASF contends that its marketing of Poast and Poast Plus cannot be the

basis for the jury's determination of fraud because it was proceeding lawfully under the federal regulations in registering Poast and Poast Plus as different products and in labeling Poast Plus for fewer than all of the crops for which it was registered with the EPA. The farmers move to strike this argument, contending that it was raised and decided by this court in *Peterson I*.

In *Peterson I*, this court specifically addressed the argument and noted that the farmers had presented evidence that the fraud was based not on BASF's lawful use of the regulations but on a plan that it designed "to conceal the fact that Poast Plus was EPA registered for use on minor crops and to discourage any off-label use of Poast Plus." 618 N.W.2d at 824. This court held that there was a genuine issue of material fact as to whether BASF's system of deceit fell within the protection of the NJCFA. *Id.* Thus, the issue has been resolved in the previous litigation and the farmers' motion to strike the argument is granted.

Further, to the extent that BASF challenges the sufficiency of the evidence on this issue, we hold that the jury could conclude that BASF's marketing scheme and exploitation of federal regulations, rather than its lawful use of federal regulations, concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the NJCFA.

Causation

The next issue concerns causation. "[A] causal relationship must exist between the ascertainable loss and the unlawful practice" to establish a violation under the NJCFA. *Roberts v. Cowgill*, 316 N.J. Super. 33, 719 A.2d 668, 672 (App. Div. 1998). "[O]nce a plaintiff has established a significant relationship" exists, the burden then shifts to the defendant to show that any particular losses do not have the requisite causal connection. *Id.* at 673. Even if the disputed

commercial practice is not inherently deceptive, "[t]he statutory and regulatory scheme is also designed to promote the disclosure of relevant information to enable the consumer to make intelligent decisions in the selection of products and services." *Div. of Consumer Affairs v. Gen. Elec. Co.*, 244 N.J. Super. 349, 582 A.2d 831, 833 (App. Div. 1990).

BASF asserts that the farmers' theory of causation cannot stand as a matter of law. In *Peterson I*, however, this court recognized the basis for the farmers' claim for damages:

> [The farmers] claim that they lost the opportunity to refuse to buy Poast because BASF's marketing scheme and exploitation of federal regulations concealed that Poast Plus was registered for the same uses as Poast. [Farmers'] reactions when they learned of BASF's scheme constitute circumstantial evidence that these farmers would not have stood idly by and paid inflated fees to BASF.

618 N.W.2d at 825. The farmers contend that BASF's argument should be stricken because this court conclusively determined that whether BASF's actions arose to fraud under the NJCFA was a jury question. To the extent that BASF makes the legal argument again in this appeal, the argument is stricken.

BASF also contends that the evidence does not support the verdict as to causation. The evidence will be viewed in the light most favorable to the verdict. *Pouliot*, 582 N.W.2d at 224. This court cannot set aside the verdict "if it can be sustained on any reasonable theory of evidence." *Id.* (citation omitted).

BASF contends that the farmers' argument that they were unfairly induced to buy Poast rather than Poast Plus must rest on their ability to force BASF to offer Poast Plus for minor crop use. It argues that as a matter of law it has the right to choose whether or not to market Poast Plus for minor crops.

While BASF's argument may be true, this argument does not address the claim that BASF engaged in fraud.

Next, BASF contends that Poast Plus was not fully tested on minor crop use, citing testimony from its witnesses that Poast Plus had received only limited crop safety testing on minor crops. There was, however, extensive evidence from which the jury could conclude to the contrary. It was undisputed that when BASF registered Poast Plus with the EPA, no new residue testing data was required because Poast Plus, when applied according to directions, delivered the same amount of sethoxydim that Poast did. Further, the EPA required that companies seeking registration must complete efficacy and crop safety testing, although the companies are not required to submit the data to the EPA. Moreover, evidence showed that Poast Plus was used successfully on minor crops when permitted under North Dakota's and South Dakota's 24I registrations. There was also testimony by one of BASF's witnesses that the herbicide Vantage, an alternative name for Poast Plus, was labeled and marketed for use on fruit trees prior to development of fruit and ornamental and nursery plantings with only very limited testing. There was clearly evidence in the record from which the jury could have concluded that BASF believed Poast Plus had been sufficiently tested for use on minor crops.

Next, BASF asserts that because no state had approved Poast Plus for use on all 60 minor crops, it could not have legally marketed or sold Poast Plus for use on those crops, and farmers could not legally use it. It contends that each state requires its own crop-specific registration and approval of each pesticide before permitting sale or use within its borders. *See, e.g.*, Minn. Stat. 18B.26 (2002) (pesticide registration). BASF asserts that states apply different standards and may refuse to register pesticides for various crops regardless of the EPA registration. Consequently, it contends that the farmers sought to impose on BASF a duty to illegally pro-

mote and sell a pesticide for crops on which it could not legally be used.

Again, however, the farmers presented evidence from which the jury could reach a different conclusion. The farmers' expert testified that once a company obtains an EPA registration, it is "very easy" to obtain a state registration in the majority of the states. The process is generally regarded as a mere formality except in California, Wisconsin, New York, and Florida, unless the product is considered risky. Poast Plus is not considered risky. The expert explained that the states rely on the EPA label to ensure that the product has the proper residue tolerances, safety, and efficacy. For BASF to register Poast Plus for the additional minor crops in most states, he noted that it would merely have to include those crops on the EPA label, send a letter to the state departments of agriculture with a small fee, and ask that the additional crops be included on the state registration.

Next, BASF challenges the farmers' theory that, had the farmers known that Poast and Poast Plus had been registered with the EPA for the same uses, they would have been able to force BASF to lower the price of Poast to a fair price for minor crop use and "would not have stood idly by and paid inflated prices to BASF." BASF first contends that the farmers cannot force it to sell Poast at the price that they want. But this is not what the farmers contended. Instead, the issue here was whether such sales were based on fraud and thus were unlawful.

BASF also contends that the farmers are asserting that they have a right to engineer an illegal, concerted, horizontal boycott to drive down the price of Poast. *See F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (holding that where members of bar association agreed to stop representing indigent criminal defendants until government increased their compensation, this was a per se unlawful restraint of trade). But there was no evidence in this case of

such an illegal "boycott." Instead, the evidence showed that the farmers discussed their individual decisions not to purchase BASF products.

BASF also contends that, assuming the "proposed boycott" was not illegal, New Jersey law does not support the farmers' "right to boycott" or "fraud on the market" theory. But the cases cited by appellant BASF are distinguishable. *See, e.g., Kaufman v. I-Stat Corp.*, 165 N.J. 94, 754 A.2d 1188, 1189 (2000) (addressing common-law fraud claim); *Jiries v. BP Oil*, 294 N.J. Super. 225, 682 A.2d 1241, 1243-44 (Law Div. 1996) (holding plaintiff failed to show ascertainable loss).

BASF next contends that the farmers failed to produce evidence to establish a causal link between BASF's conduct and an ascertainable loss. Again, the standard we must apply is whether the verdict can be sustained on any reasonable theory of evidence. *Pouliot*, 582 N.W.2d at 224.

In *Peterson I*, this court recognized that an ascertainable loss may be shown by the farmers' lost opportunity to refuse to purchase Poast due to BASF's fraud. 618 N.W.2d at 824-25. Here, the farmers assert they showed causation by evidence that they lost the opportunity to protest, petition for relief from governmental agencies, litigate, or simply make an intelligent, informed decision on whether to refuse to buy the more expensive Poast. They presented testimony from various witnesses, including the class representatives, that upon learning of BASF's fraudulent scheme, they engaged in or recommended just such activities. The jury again had evidence from which it could and did find causation. BASF has not shown that it has met the standards for JNOV.

II

BASF next seeks JNOV on the jury's award of damages for the crop years 1992 and 1995-1996. As discussed above, the standard for JNOV is whether the verdict can be sus-

tained on any reasonable theory of the evidence. *Pouliot*, 582 N.W.2d at 224.

In awarding damages under the NJCFA, the goals of the act are twofold. *Cox*, 647 A.2d at 463. First, the act "is clearly remedial in that it seeks to compensate a victim's loss." *Id.* Second, it serves as a deterrent, because it punishes the wrongdoer by awarding the victim treble damages, attorney fees, and costs. *Id.* "[I]n determining whether plaintiff has established a loss under the Act, we are guided by but not bound to strict contract principles." *Id.* at 463-64.

BASF first argues that this court must reduce the portion of the damages attributed to the 1992 Poast sales because they are not supported by the evidence. The jury awarded $2,000,000, and, with treble damages and attorney fees, BASF asserts this amounts to $6,141,356.27.

BASF contends that even accepting the farmers' theory of damages, the record conclusively demonstrates that Poast Plus was not fully EPA-registered for use on minor crops until late October 1992, well after the annual crop season. Consequently, it asserts that no damages may be awarded for that year. It cites a February 18, 1992, EPA letter to BASF indicating that the registration was approved, but requiring submission of several more documents. The letter stated that if BASF did not comply with these conditions, the registration would be cancelled, but that release of the product for shipment constituted acceptance of the conditions.

The jury, however, had evidence to support its award of damages for 1992. First, the jury could have concluded that the product could be released for shipment before the final technical requirements were met. Second, the farmers' expert, who calculated damages, explicitly did not use the entire sales year for his 1992 calculation. Instead, he excluded sales of Poast for January through March because the EPA registration was received in February and it would then take

several weeks to obtain approval from the states. The evidence in the record supported the jury's verdict, and the district court properly denied JNOV on this ground.

Next, BASF contends that it is entitled to partial JNOV as to the damages award for the years 1995 and 1996. The jury awarded $4,000,000 damages for 1995 and $1,000,000 for 1996. BASF calculates that, after these amounts are trebled and prejudgment interest included, this amounts to $16,035,890.66, and BASF seeks reduction of the verdict by this amount.

BASF contends that the farmers cannot as a matter of law sustain their "lost opportunity" claim for 1995 and 1996, which rests on the assertion that BASF deprived them of the opportunity to refuse to buy Poast. It asserts that by May 1994, all of the information concerning EPA minor crop registration of Poast Plus was public knowledge and, by 1996, all of the plaintiffs had actually stopped buying Poast. BASF contends that as a matter of logic, they cannot claim to have suffered an ascertainable loss from a lost opportunity that they actually exploited, based on ignorance of facts they actually knew.

The farmers contend that they presented substantial evidence to the jury that BASF's unlawful conduct resulted in a broad-based, inflated price for the more expensive Poast herbicide resulting from mass consumer deception, exploitation, and "system of deceit." *See Peterson I*, 618 N.W.2d at 824. As discussed above, they asserted that this prevented farmers and state regulatory authorities from ascertaining the truth and consumers lost the opportunity to make informed purchasing decisions. They note that the jury was aware that in 1997, after BASF's scheme was uncovered and litigation commenced, BASF dropped the price of Poast nationwide to a price equivalent to Poast Plus.

The farmers' expert testified extensively as to the basis for his conclusion as to the damages the farmers suffered. He testified that the 1995 damages were $6,440,647, BASF's expert testified they were $2,290,500, and the jury awarded $4,000,000. For 1996, the farmers' expert testified damages were $2,419,533, BASF's expert concluded they were just $550,220, and the jury awarded $1,000,000. The jury heard and considered all the evidence, and there was evidence to support its verdict; the district court did not err in denying JNOV as to damages occurring in 1995 and 1996.

III

BASF contends that it is entitled to a new trial based on the trial court's failure to instruct the jury on numerous crucial elements of its defenses and on its improper admission of evidence.

Jury Instructions

The district court has broad latitude in selecting the language of jury instructions, as well as in determining the propriety of a specific instruction. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). Jury instructions will not be reversed absent an abuse of discretion. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). Where the instructions are overall a correct statement of the law, a new trial is not warranted. *Id.* Jury instructions will be reviewed as a whole. *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974).

The jury instruction charge need only "convey to the jury a clear and correct understanding of the law." *Cameron v. Evans*, 241 Minn. 200, 209, 62 N.W.2d 793, 798 (1954). "Usually it is preferable to give a general charge * * * upon the whole law of the case," rather than risk confusing the jury or emphasizing one side of the case by emphasizing particular items. *Id.* at 209, 62 N.W.2d at 799.

> A party is entitled to a specific instruction on his theory of the case if there is evidence to support the instruction and it is in accordance with the applicable law.

Cornfeldt v. Tongen, 262 N.W.2d 684, 698 (Minn. 1977) (citations omitted).

The district court instructions track virtually verbatim the New Jersey Supreme Court's model NJCFA jury instructions, taken from the New Jersey Model Civil Charges 4.23 (May 1998), http://www.judiciary.state.nj.us/charges/civil/423.htm (last modified Jan. 2001). The instructions describe and define the two relevant bases for liability under the act, affirmative acts and omissions, and address proximate cause and damages.

BASF first contends that the instructions were deficient because they did not define materiality and did not advise the jury that the affirmative misrepresentation had to be material. BASF contends that a statement is material if "a reasonable person would attach importance to its existence in determining a choice of action." *Ji v. Palmer*, 333 N.J. Super. 451, 755 A.2d 1221, 1228 (App. Div. 2000) (quotation omitted).

The court instructed the jury as follows:

> A misrepresentation is an untrue statement, which is made about a fact, *which is important or significant to the sale or advertisement*, and it is communicated to another person to create the possibility that the other person will be misled.

(Emphasis added.) Similarly, the omission instruction refers to omission of "an important or significant fact." BASF has failed to show an abuse of discretion.

Next, BASF challenges the verdict form. A district court has "broad discretion in drafting special-verdict questions." *Russell v. Johnson*, 608 N.W.2d 895, 898 (Minn. App. 2000) (citation omitted), *review denied* (Minn. June 27, 2000).

While BASF acknowledges that the court instructed the jury that any actionable omission must relate to a material fact, it contends that the court committed a reversible error because the verdict form itself did not refer to "material fact." Instead, the verdict form asked:

> Did BASF engage in a knowing omission, suppression or concealment *of the truth in relation to* BASF's marketing and pricing strategies for Poast and Poast Plus?

(Emphasis added.)

First, BASF did not request a separate question on omission in the verdict form, although it did argue that if there were such a question it should refer to materiality. In any event, the materiality issue is encompassed by requiring the jury to find BASF engaged in omissions "in relation to" its marketing and pricing strategies; the jury was instructed as to materiality as well. Considering the instructions as a whole, the court "fairly and correctly stated the applicable law" and did not abuse its discretion. *See Russell*, 608 N.W.2d at 898 (stating this standard) (citation omitted).

Next, BASF challenges the district court's failure to give multiple jury instructions relating to a variety of topics raised at trial. Generally, the trial court is not required to give a specific requested instruction unless it is necessary to allow the jury to intelligently decide the question. *Malik v. Johnson*, 300 Minn. 252, 258, 219 N.W.2d 631, 635 (1974). Applicable statutes and regulations that have the force of law may properly be read to the jury. *Mikes v. Baumgartner*, 277 Minn. 423, 431, 152 N.W.2d 732, 738 (1967).

BASF's proposed instructions do not relate directly to the charge before the jury, which was whether BASF violated the NJCFA. Further, throughout the entire trial, the jury heard numerous discussions of these issues and the various witnesses' descriptions of the effect of the regulations. These topics were more properly the subject of counsel's final ar-

gument rather than jury instructions, and the court did not abuse its discretion in denying the request to include these instructions.

Admissibility of evidence

BASF next argues that the district court erroneously admitted evidence that was either protected by the First Amendment, privileged as a matter of law, or legally irrelevant. The admissibility of

> evidence rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion.

Uselman v. Uselman, 464 N.W.2d 130, 138 (Minn. 1990) (citation omitted). Before the complaining party can show it is entitled to a new trial based on improper admissions, it must "demonstrate prejudicial error." *Id.* (citation omitted).

We first address BASF's claims that certain evidence was protected by the First Amendment or privileged. BASF contends that its employee's truthful reports to North Dakota officials concerning possible illegal off-label use of Poast Plus were inadmissible because they were protected by the First Amendment and public policy. In support of this argument, it cites primarily defamation cases and a prior restraint case. *See, e.g., Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (prior restraint); *Richmond v. Nodland*, 552 N.W.2d 586 (N.D. 1996) (defamation). Here, there is no claim that the reports that BASF seeks to protect were defamatory or that prior restraint was at issue. Instead, the evidence showed that BASF's employee turned in BASF's own dealers on the suspicion that Poast Plus was being used on minor crops for which they were EPA-registered although not state-labeled. This evidence was used to support the farmers' claim of consumer fraud. Misleading and confusing statements are not protected by the First Amendment. *Smith v. Condux Int'l*,

466 N.W.2d 22, 26 (Minn. App. 1991). There is no support for BASF's claim that the First Amendment protects its employee's reports here.

Next, BASF challenges the district court's admission of an article published in the March 1993 issue of The Sugarbeet Grower magazine. The article, submitted by BASF's public relations firm, describes the illegality and consequences of off-label pesticide use, but it does not mention any BASF product. BASF contends that the First Amendment protects true speech even in a lawsuit by a private party, and it cites *N.Y. Times v. Sullivan*, 376 U.S. 254, 265 (1964) (libel). This consumer fraud action, however, does not raise a libel claim. Again, there is no support for BASF's claim that the district court abused its discretion in admitting the magazine article because of First Amendment concerns.

Finally, BASF argues that its employee's statements at the official meeting of the North Dakota Pesticide Control Board were absolutely privileged under North Dakota laws. The code states that "every person * * * has the right of protection from bodily restraint or harm, from personal insult, from *defamation*, and from injury to the persons personal relations." N.D. Cent. Code 14-02-01 (1997) (emphasis added). It provides that a communication made "[I]n any legislative or judicial proceeding or in any other proceeding authorized by law" is a privileged communication. *Id.* 14-02-05(2) (1997). BASF contends that if the statements pertain to the official proceeding, they are absolutely privileged, even if they are false and made with malice. *See Soentgen v. Quain Ramstad Clinic*, 467 N.W.2d 73, 78 (N.D. 1991) (addressing privilege in a defamation action). BASF's argument is flawed for the same reason that its First Amendment argument fails: this is a consumer fraud action, not a defamation action. Consequently, there is no support for BASF's claim that these statements to the North Dakota Pesticide Control

Board were protected by privilege. In conclusion, we note that as to these three claims, BASF cites no direct authority to support its arguments that the evidence was not admissible and has demonstrated no prejudicial error.

BASF next contends that evidence of its reports about possible off-label use by its dealers, the Sugarbeet Grower article, and its appearance before the North Dakota Pesticide Board were irrelevant to the claim of consumer fraud.

> Relevant evidence is that having
>
> any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Minn. R. Evid. 401. Generally, all relevant evidence is admissible. Minn. R. Evid. 402. The district court's decision regarding the admissibility of evidence will not be reversed absent an erroneous view of the law or an abuse of discretion. *Uselman*, 464 N.W.2d at 138.

This evidence was discussed at length at trial and was relevant to the farmers' claim that BASF violated the NJCFA. BASF has not shown that the district court abused its discretion in admitting this evidence.

Finally, BASF contends that the district court improperly allowed the jury to consider what it characterizes as claims of deceptive labeling and differential pricing. This court has considered and rejected most of these claims. *Peterson I*, 618 N.W.2d at 824. To the extent they were already considered, these arguments are stricken. Further, our review shows that the evidence presented and the arguments made were addressed to the issue of consumer fraud. There is no showing of error.

IV

BASF contends that the district court abused its discretion when it refused to decertify the class. In support of this argument, it engages first in an extensive discussion of choice-of-law doctrine and certification law.

In *Peterson I*, this court addressed BASF's challenge to the certification of the farmers as a class for purposes of their NJCFA claim, reviewed under an abuse of discretion standard. 618 N.W.2d at 825-26. This court concluded that "the district court did not abuse its discretion in certifying [the farmers] as a class on their New Jersey Consumer Fraud Act claim." *Id.* at 826.

The farmers moved this court to strike the certification issue. BASF contends, however, that this court did not address its "choice-of-law" argument in *Peterson I* and that it is not precluded from raising the issue in this appeal. The choice-of-law argument is the basis for BASF's certification argument. In *Peterson I* this court decided the certification issue, and thus BASF is precluded from raising it a second time in this appeal. The farmers' motion to strike this argument is granted.

V

Next, we turn to issues relating to prejudgment interest that the farmers raised in their notice of review. The district court determined that the farmers were entitled to prejudgment interest against BASF from December 15, 1997, the date the complaint was filed in district court. The farmers contend that because the damages were ascertainable in each year from 1992 to 1996, prejudgment interest should be calculated from those dates.

On appeal, questions of law governing prejudgment interest are reviewed de novo. *Trapp v. Hancuh*, 587 N.W.2d 61, 63 (Minn. App. 1998). Fact determinations underlying

the application of the statute, such as whether the claim is liquidated, readily ascertainable, or unliquidated, will not be reversed unless clearly erroneous. *Id.*

Generally, prejudgment interest may be awarded from the time of the commencement of the action. Minn. Stat. 549.09, subd. 1(b) (2002). It is also allowable on liquidated claims, as well as on unliquidated claims on which the amount is "readily ascertainable." *Trapp*, 587 N.W.2d at 63.

Damages are readily ascertainable if they can be determined

> by computation or reference to generally recognized standards such as market value and not where the amount of damages depended upon contingencies or upon jury discretion (as in actions for personal injury or injury to reputation).

Potter v. Hartzell Propeller, Inc., 291 Minn. 513, 518, 189 N.W.2d 499, 504 (1971) (citations omitted). The requirement that the damages be ascertainable is based on the theory that it would be

> unreasonable to require defendant to compensate plaintiff for this loss where defendant could not have readily determined the amount of damages himself either by computation or reference to generally recognized standards such as market value.

Id.

In this case, the question is whether the district court was clearly erroneous in determining that the damages were not readily ascertainable. The farmers cite the fact that BASF admitted that an average price differential between Poast and Poast Plus during the class action was $4 per acre. BASF contends that the damage awards rested almost entirely on the discretion of the jury.

Both parties presented experts to calculate damages. BASF's expert arrived at a figure of $7,251,417, while respondents' expert calculated damages of $26,182,501. These differences were based on a variety of factors, including the number of gallons of Poast used per acre, whether "list" or "actual" price was used, the markup attributed to the dealer, and whether or not information for 1992, the first year for which Poast Plus was registered for use on minor crops, was used. Both experts were cross-examined and other witnesses gave testimony as well. The jury verdict for damages was $15,000,000.

A "mere difference" of opinion as to the amount of damages does not preclude an award of prejudgment interest. *Potter*, 291 Minn. at 519, 189 N.W.2d at 504. Instead, the issue is whether the defendant could have ascertained damages from "a generally recognized objective standard of measurement, such as readily ascertainable market value." *Id.*

Here, the experts offered different opinions as to damages based on a variety of factors. The jury's damage award, which is between the amounts offered by the parties' experts, shows that it considered the parties' contentions regarding the dates and extent of damages and other factors. The district court was not clearly erroneous in determining that damages were not readily ascertainable.

The farmers also contend that prejudgment interest is considered part of the substantive damages which, under New Jersey law, is subject to mandatory trebling. The NJCFA states, "[I]n any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest." N.J. Stat. 56:8-19. The farmers contend that prejudgment interest constitutes substantive damages intended to compensate the victim for deprivation of the monetary value of their loss. *See Busik v. Levine*, 63 N.J. 351, 307

A.2d 571, 575 (1973) (finding that prejudgment interest is compensatory as to the parties and represents damages for delay in payment).

The prejudgment interest statute is considered more procedural than substantive so that the law of the forum state applies. *Zaretsky v. Molecular Biosystems, Inc.*, 464 N.W.2d 546, 550-51 (Minn. App. 1990). Prejudgment interest is an element of compensatory damages. It is "awarded to provide full compensation by converting time-of-demand * * * damages into time-of-verdict damages." *Lienhard v. State*, 431 N.W.2d 861, 865 (Minn. 1988) (citations omitted). Where interest was awarded on trebled damages, this court allowed interest only on the first third of the trebled damages.

> [O]nly the first third of the trebled damages is compensatory. The remainder is at least "noncompensatory" and the trial court's allowance of prejudgment interest on this amount must be reversed.

Muehlstedt v. City of Lino Lakes, 473 N.W.2d 892, 896 n.2 (Minn. App. 1991) (quoting Minn. Stat. 549.09, subd. 1(b)(4) (1990)), *review denied* (Minn. Sept. 25, 1991).

Consequently, the district court properly applied interest only to the damages award, not the trebling of the damages award.

DECISION

BASF has not demonstrated that it is entitled to JNOV on the jury's verdict that it engaged in consumer fraud or on the jury's award of damages. The district court did not abuse its discretion in its jury instructions, the verdict form, or in its admission of evidence. As to BASF's challenge to the class certification, this court decided the issue in *Peterson I* and under the law-of-the-case doctrine, the issue may not be raised again in this appeal. Finally, we affirm the district court's decision on prejudgment interest issues that the farm-

ers challenge in their notice of review. In conclusion, the district court decision is affirmed, and the farmers' motions to strike are granted in part.

Affirmed.

G. BARRY ANDERSON, Judge (concurring specially).

I concur with the majority here, largely because of our prior holding in *Peterson v. BASF Corp.*, 618 N.W.2d 821 (Minn. App. 2000), *review denied* (Minn. Jan. 26, 2001).

But while respondents have put together a persuasive set of facts outlining misconduct on the part of appellants, at the end of the day, this dispute is the poster child for national class action reform. We have here a Minnesota district court, applying a New Jersey consumer fraud statute to a nation-wide class of plaintiffs, with few of those plaintiffs residing in New Jersey. And, it is probably a fair assumption that the legislative authors of the New Jersey consumer protection scheme did not have in mind midwestern farmers purchasing agricultural chemicals as the protected class. Indeed, at least one of the amicus briefs notes that the connections with New Jersey are hardly overwhelming.

This is not a recipe for uniformity or consistency, it is fair neither to claimants nor defendants and it is long past time for national policy makers to address class action procedures.

Court of Appeals of Minnesota.

RONALD PETERSON, ET AL.,
individually and on behalf of
all others similarly situated, Appellants,

v.

BASF CORPORATION,
foreign corporation, Respondent.

No. CX-00-737.

Nov. 14, 2000.

Review Denied Jan. 26, 2001.

Considered and decided by KLAPHAKE, Presiding Judge, LANSING, Judge, and SCHUMACHER, Judge.

OPINION

KLAPHAKE, Judge

Appellants brought this New Jersey Consumer Fraud Act claim for fraudulent and unconscionable commercial conduct against respondent BASF Corporation, seeking damages for injuries resulting from BASF's marketing of two identical herbicides. The district court granted BASF's motion for summary judgment, concluding that appellants failed to show that there were any genuine issues of material fact. Because fact issues exist as to whether BASF's marketing was fraudulent or unconscionable commercial conduct under the New Jersey Consumer Fraud Act, we reverse and remand.

FACTS

Appellants, a group of farmers who grow minor crops such as sugar beets and sunflowers, brought this class action against respondent BASF. BASF is incorporated under Delaware law and is headquartered in New Jersey. Among other enterprises, BASF markets and sells agricultural herbicides nationwide. Two of these herbicides, "Poast" and

"Poast Plus," are sold for crops such as flax, beans, sugar beets, sunflowers, alfalfa, and potatoes.

On December 15, 1997, appellants filed suit claiming that BASF engaged in consumer fraud by marketing one herbicide as two different products, selling Poast to them at a premium price, and leading them to believe the less expensive Poast Plus had not been registered with the EPA for use on minor crops.

As support for their claims, appellants presented evidence showing that BASF used different formulation and application instructions on Poast and Poast Plus labels, even though both contained the same active ingredient. BASF then undertook an advertising campaign to stress the fact that Poast was the only product registered for minor crops. In particular, BASF listed Poast Plus in its product brochure as only registered for use on major crops, and mailed farmers a letter stating that Poast Plus should be limited to major crops to "avoid residue problems." BASF also engaged in a national public relations campaign to stress that use of Poast Plus on minor crops was unlawful and harmful to man and the environment. For example, BASF (1) sent a position paper stating that off-label use of Poast Plus would result in hefty fines; (2) was involved in an article stating that off-label use can be dangerous to consumers and the environment; (3) proceeded to report off-label use of Poast Plus to state regulatory authorities, resulting in some farmers being criminally prosecuted; and (4) misled state agriculture officials about the EPA registration status of Poast Plus.

On March 1, 2000, the district court granted BASF's motion for summary judgment and dismissed appellants' New Jersey Consumer Fraud Act claims. This appeal followed.

ISSUES

1. Did the district court properly grant summary judgment, where BASF's exacting of higher prices from farmers

by exploiting the federal herbicide registration process raised genuine issues of material fact?

2. Did the district court abuse its discretion in certifying appellants as a class?

ANALYSIS

I.

Summary judgment is properly granted when there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal, "we view the evidence in the light most favorable to the party against whom summary judgment was granted." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (citation omitted). "Any doubt as to whether issues of material fact exist is resolved in favor of the party against whom summary judgment was granted." *Id.* (citation omitted).

Appellants' claims against BASF are based on the New Jersey Consumer Fraud Act. The purpose of the act "is aimed basically at unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate." *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 390 A.2d 566, 568 (1978). The act provides:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice[.]

N.J. Stat. Ann. § 56:8-2 (West 1989). The New Jersey Supreme Court has defined "unconscionable" as

> an amorphous concept obviously designed to establish a broad business ethic. The standard of conduct that the term unconscionable implies is lack of good faith, honesty in fact and observance of fair dealing.

Cox v. Sears Roebuck & Co., 138 N.J. 2, 647 A.2d 454, 462 (1994) (quotations and citations omitted).

Appellants alleged that BASF unconscionably exploited the regulatory standards and overtly deceived and lied to farmers to conceal the fact that the less expensive Poast Plus was registered with the EPA for the same crops as Poast. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requires herbicides to be registered with the Environmental Protection Agency (EPA). 7 U.S.C. § 136a (1994 & Supp. IV 1998). Through this registration process the EPA also regulates the labeling and packaging of herbicides. *Id.* This process begins with the manufacturer receiving authorization from the EPA to register the herbicide for use on certain crops. FIFRA then allows the states to require the manufacturer to receive state registration to use the herbicide on certain crops. Appellants alleged that BASF designed a plan to limit the state registration of Poast Plus.

In 1992, BASF received authorization from the EPA to register Poast Plus for all the uses it currently held for Poast, which included both major and minor crops. BASF proceeded to register Poast Plus with the states for use only on major crops. BASF's registering of one herbicide for use on different crops was specifically permitted by the EPA. 40 C.F.R. § 152.130(b) (1994). Appellants presented evidence, however, to suggest that BASF designed a plan to conceal the fact that Poast Plus was EPA registered for use on minor crops and to discourage any off-label use of Poast Plus. That evidence consisted of BASF's (1) involvement in publishing

articles and newsletters discouraging the use of Poast Plus on minor crops; (2) encouragement of criminal prosecutions for off-label use; and (3) actions in lying to state regulatory authorities about the registration status of Poast Plus. Thus, appellants have shown that a genuine issue of material fact exists as to whether BASF's system of deceit falls within the broad protection of the New Jersey Consumer Fraud Act.

BASF argues that even if there is a basis under this act, appellants are barred due to their inability to show damages. See N.J. Stat. Ann. § 56:8-19 (West Supp. 2000) (under New Jersey Consumer Fraud Act, party seeking to recover damages must suffer "any ascertainable loss of moneys or property * * * as a result of the use or employment * * * of any method, act, or practice declared unlawful under this act"); *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 541 A.2d 1063, 1068 (1988) (precluding private cause of action under New Jersey Consumer Fraud Act, where no ascertainable loss shown).

BASF relies on the federal labeling law to claim that appellants cannot show damages. BASF argues that even if appellants knew that Poast Plus was federally registered for the same uses as Poast, they could not have used Poast Plus on their minor crops because it was not labeled for such use. *See* 7 U.S.C. § 136j(a)(2)(G) (1994) (once herbicide is labeled for specific use "[i]t shall be unlawful for any person * * * to use any registered [herbicide] in a manner inconsistent with its labeling"). BASF's focus is misplaced, however, because appellants' claim is based on their lost opportunity to choose whether to buy Poast or the identical, but four dollars per acre cheaper, Poast Plus. This type of a lost opportunity or financial detriment may be sufficient to prove damages.

In *Sutton v. Viking Oldsmobile Nissan, Inc.*, 611 N.W.2d 60 (Minn. App. 2000), a case brought under the Minnesota Prevention of Consumer Fraud Act, this court reversed the

district court's determination that no damages had been shown, where

> [the plaintiff] testified that if he had known the extent of [the defendant's] profit on the service contract, he would have negotiated a lower price or refused to buy it. [The plaintiff] therefore either overpaid for the service contract or lost the opportunity to refuse to buy it because of the large profit [the defendant] would make on it.

Id. at 65.

Similarly, in this case appellants claim that they lost the opportunity to refuse to buy Poast because BASF's marketing scheme and exploitation of federal regulations concealed that Poast Plus was registered for the same uses as Poast. Appellants' reactions when they learned of BASF's scheme constitute circumstantial evidence that these farmers would not have stood idly by and paid inflated fees to BASF.

We therefore conclude that the issues of whether BASF's actions rise to the level of fraud or an unconscionable commercial practice under the New Jersey Consumer Fraud Act are issues for a jury to decide. The district court's grant of summary judgment is reversed and the matter is remanded for further proceedings.

II.

BASF also filed a notice of review, challenging the certification of appellants as a class for purpose of their claims under the New Jersey Consumer Fraud Act. District courts have considerable discretionary power to determine whether a class action is maintainable. *Streich v. American Family Mut. Ins. Co.*, 399 N.W.2d 210, 213 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987) (citing *Forcier v. State Farm Mut. Auto. Ins. Co.*, 310 N.W.2d 124, 130 (Minn. 1981)).

To represent a class in Minnesota, appellants first must satisfy prerequisites of number and common question, and show that the issues are typical and representative of the class. Minn. R. Civ. P. 23.01.

Number

BASF does not dispute that the class is so numerous that joinder is impractical.

Common Questions

"The threshold for [common questions] is not high and requires only that the resolution of the common questions affect all or a substantial number of class members." *Streich*, 399 N.W.2d at 214 (citation omitted). Appellants allege that the common questions of law and fact include: (1) whether BASF's alleged marketing practices violated the New Jersey Consumer Fraud Act; and (2) the amount of damages incurred by potential claimants. The district court did not abuse its discretion in determining that sufficient common questions exist.

Issues Representative and Typical of Class

"The remaining prerequisites are often viewed as a two-pronged approach 'intended to insure that the claims of the class members are fully presented and vigorously prosecuted.'" *Id.* at 215 (citation omitted).

Typical issues focus on the representative parties and examine whether the parties "have an interest compatible with that of the class sought to be represented." *Ario v. Metropolitan Airports Comm'n*, 367 N.W.2d 509, 513 (Minn. 1985) (citation omitted). The typical issues requirement "refers to the potential for rivalry and conflict which may jeopardize the interests of the class." *Id.* The district court did not abuse its discretion in determining that no such tension likely would occur in this case.

The representative issue requirement means the representative parties' "interests must coincide with the interests of other class members" and the parties and their counsel will "competently and vigorously prosecute the lawsuit." *Id.* (citation omitted). The district court did not abuse its discretion in determining that appellants' counsel is competent to represent the class. Thus, the requirement of representation is satisfied.

Once appellants have satisfied the four prerequisites of rule 23.01, they must show that their proposed class meets one of the requirements of Minn. R. Civ. P. 23.02. Rule 23.02(c) requires a court to find that common questions predominate over individual questions and that a class action provides a superior method of adjudicating the controversy.

> To determine whether common questions of law or fact predominate over individual questions, the court must consider the elements which the plaintiff must establish in order to recover on the claim against the defendant. To predominate, common issues must constitute a significant part of the individual cases.

Streich, 399 N.W.2d at 217 (citation omitted).

Factors to consider in this analysis include "manageability, fairness, efficiency, and available alternatives." *Id.* at 218 (citation omitted). "The purpose of the class action has been to take 'care of the smaller guy.'" *Id.* (citing *Dolgow v. Anderson*, 43 F.R.D. 472, 485 (E.D.N.Y.1968)). The class action is most often needed in consumer suits where individual claims are small. *Forcier*, 310 N.W.2d at 130. "[W]here the potential recovery is too small to justify individual litigation, a class action is proper." *Id.* (citing *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 241-42, 219 N.W.2d 641, 653 (1974)).

In *Rathbun*, the plaintiffs brought a class action to declare the defendant's installment credit plan usurious. The district

court limited the class action to the single issue of usury and further limited the action to the question of liability, exclusive of damages. The supreme court concluded that the class action was a superior method of promoting the public purpose of the usury statute, which was designed to protect those who cannot protect themselves. The court concluded:

> All members of the class are entitled to recover the interest charged them. It is unreasonable to assume that they will all litigate individually their just claims.

Id. at 241-42, 219 N.W.2d at 653.

Although management problems inhere in any class action, the district court is vested with broad powers to alleviate any procedural problems which may arise. *Forcier*, 310 N.W.2d at 130. The reasoning of *Rathbun* applies equally to promoting the public purpose of consumer fraud statutes to protect those who cannot protect themselves. We therefore conclude that the district court did not abuse its discretion in certifying appellants as a class on their New Jersey Consumer Fraud Act claim.

DECISION

The district court's grant of summary judgment is reversed and the matter is remanded for further proceedings.

Affirmed in part, reversed in part, and remanded.

STATE OF MINNESOTA
COUNTY OF NORMAN

IN DISTRICT COURT
NINTH JUDICIAL DISTRICT

RONALD PETERSON, BARRY THUNE, OWEN LARSON, OWEN LARSON FARMS, INC., DUANE EVENSON, JEFFREY NESVIG, RICHARD MOEN, CHRISTOPHER GROVE, CHRISTOPHER GROVE FARMS, INC., DAVID ABENTROTH, GLENN ASBECK, ASBECK, INC., DONALD STEINBEISSER, JOE G. STEINBEISSER & SONS, INC., STEPHEN PUST, AND STEPHEN Pust FARMS, INC.,
individually and on behalf of all others similarly situated, Plaintiffs,

vs.

BASF CORPORATION,
a foreign corporation, Defendant.

ORDER GRANTING SUMMARY JUDGMENT

Court File No. C2-97-295

In January of 1999, the Defendant brought three motions for Summary Judgment in the above-entitled matter, labeling claims, representations to the Department of Agriculture, and all remaining claims. The Court deferred its decision until discovery had been completed. Discovery was completed February 4, 2000.

On February 18, 2000, the Defendant brought a summary judgment motion regarding the Plaintiffs' New Jersey Consumer Fraud Claims. Present at the hearing in the Norman County Courthouse, Ada, Minnesota were:

Hugh Plunkett, PLUNKETT, SCHWARTZ & PETERSON, and Douglas Nill, Esquire, appearing by and on behalf of the Plaintiffs.

Brian O'Neill, Jim O'Neal, Winthrop Rockwell, and Amy Freestone, FAEGRE & BENSON, Kenneth Johannson, JOHANNSON, RUST, FAGERLUND, YON & STOCK, and Moira Brophy, in-house counsel for BASF, appearing by and on behalf of the Defendant.

Being advised in the premises, IT IS HEREBY ORDERED:

1. That Defendant's motions for summary judgment are HEREBY GRANTED.
2. All Counts in the Second Amended Class Action Complaint are dismissed with prejudice and all matters, including pre-trial matters, are hereby stricken from the Court's calendar.
3. All other motions brought February 18, 2000, in the above-entitled Court file are hereby DENIED.

The attached memorandum is made a part hereof.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

DATE: MARCH 1, 2000

/S/ MICHAEL J. KRAKER
Michael J. Kraker
Judge of the District Court

DATE: MARCH 1, 2000

The above Conclusions of Law constitute the Judgment of the Court.

Gordon K. Bahner
Court Administrator

BY: /S/ GORDON K. BAHNER

MEMORANDUM

The relevant facts in the instant case appear to be the following:

1. BASF Corporation, Defendant, is incorporated under the laws of Delaware and is headquartered in the State of New Jersey. BASF manufactured, marketed and sold the herbicides, Poast® and Poast Plus®, from January 1992 to January 1997, in the national agricultural market.

2. The Plaintiffs purchased Poast® between January 1992 and January 1997.

3. To sell herbicides in the national agricultural market the herbicide must be registered at both the Federal level, the Environmental Protection Agency ("EPA"), and, the State level, departments of agriculture for that state. The product must also be labeled by the manufacturer as to what crops the product is registered for.

4. Poast® and Poast Plus® were registered as separate products with the EPA, with different registration numbers and separate and distinct compositions.

5. Poast® and Poast Plus® share the same active ingredient base, Sethoxydim.

6. Poast® and Poast Plus® were registered with the EPA for use on "major crops": such as peanuts, cotton, soybeans & alfalfa, and, "minor crops": such as sugar beets, sunflowers, dried beans, flax and potatoes, among others.

7. The Defendant registered Poast® for use on both "major" and "minor" crops with the state departments of agriculture.

8. The Defendant registered Poast Plus® for use on "major" crops with state departments of agriculture, but, Defendant did not register Poast Plus® with any of the fifty state departments of agriculture for use on "minor" crops.

9. Poast Plus® was labeled for use only on "major" crops. The label did not indicate that it was registered with the EPA for sugarbeets, sunflowers, dried beans, flax or potatoes, "minor crops."

10. From January 1, 1992 until January 1, 1997, Poast® was higher priced than Poast Plus® on an active ingredient per acre basis.

11. Plaintiffs could have been prosecuted for using Poast® or Poast Plus® "off label," i.e. using either pesticides in a manner inconsistent with the label.

12. Plaintiffs admitted and affirmed that they are not making a labeling claim.

13. Plaintiffs admitted and affirmed that they are not making a price-discrimination claim.

14. The Plaintiffs seek compensation from the Defendant for fraudulent and unconscionable commercial conduct through its marketing of Poast® and Poast Plus® in violation of the New Jersey Consumer Fraud Act, pursuant to N.J.Stat.Ann. § 56:8.1 et seq.

Defendant asserts there are no genuine issues of material fact and are therefore entitled to judgment as a matter of law.

Summary judgment is to be granted if an examination of the pleadings, depositions, answers, admissions and affidavits on file show that there are no genuine issues as to any material fact, and either party is entitled to judgment as a matter of law. Rule 56.03, Minn. R. Civ. P.; *Mutual Service Life vs. Galaxy Builders*, 435 N.W.2d 136 (Minn. App.

1989). A "material fact" is a fact whose resolution will affect the result of the outcome of the case. *Borg Warner v. Shakopee Sports Center*, 431 N.W.2d 539, 540 (Minn. 1988). The facts presented must support the essential elements of the case, *Celotex*, 477 U.S. at 322, because the substantive law identifies the material facts. *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To survive a motion for summary judgment, the nonmoving party must show a genuine issue of material fact. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 585 (1986); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989). The nonmoving party cannot, when a motion for summary judgment is supported by affidavits, rely on general allegations of fact. *Erickson v. General United Life Insurance Company*, 256 N.W.2d 255 (Minn. 1977). Specific facts beyond the pleadings must be shown. *Matsushita*, 475 U.S. at 586; *Celotex Corp. vs. Catrell*, 477 U.S. 317, 324 (1986); *Carlisle vs. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989). Some metaphysical doubt as to a material fact is not enough to prevent summary judgment; a "scintilla" of evidence is insufficient to resist summary judgment, as is "merely colorable" evidence. *Anderson*, 477 U.S. at 247-50; *Matsushita*, 475 U.S. 574, 586 (1986); *Carlisle*, 437 N.W.2d at 715. The court in *Bob Useldinger & Sons v. Hangsleben*, 505 N.W.2d 323, 328-329 (Minn. 1993) stated:

> "Mere speculation without some concrete evidence is not enough to avoid summary judgment... [The evidence] must have some foundation other than mere conjecture." (citations omitted)

The court's sole role is to determine whether an issue of established material fact exists. *Marose v. Hennameyer*, 347 N.W.2d 509 (Minn. App. 1984). The court views the evidence in the light most favorable to the nonmoving party.

American Druggists Ins. v. Thompson Lumber Co., 349 N.W.2d 569 (Minn. App. 1984).

When there are no disputed facts in existence, but there is a dispute in application of law to those facts, summary judgment is proper. *Fire & Cas. Ins. Co. of Connecticut v. Illinois Farmers Ins. Co.*, 352 N.W.2d 798 (Minn. App. 1984).

Plaintiffs have failed to show that there are any genuine issues of material fact, which preclude the granting of summary judgment. Therefore, summary judgment is proper.

The parties are in agreement that the Plaintiffs are not alleging a Labeling claim.[1] Therefore, the Court will not discuss preemption under 7 U.S.C. § 136v(b). Summary judgment on the labeling claims is granted.

The parties are also in agreement that the Plaintiffs are not alleging a Price Discrimination claim.[2] Therefore, the Court will not discuss whether price discrimination is actionable under Minnesota, Delaware or New Jersey law. Summary judgment on the price discrimination claims is granted.

The remaining issue before the Court is whether the Plaintiffs have a claim under the New Jersey Consumer Fraud Act for fraudulent and unconscionable commercial conduct through its marketing of Poast® and Poast Plus®.

The Plaintiffs' claims are based on New Jersey Revised Statute 56:8-1, which makes unlawful:

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[1] Based on Defendant's Motion for Summary Judgment on Labeling Claims, and Plaintiffs' reply to the Defendant's Summary Judgment motions on February 18, 2000, Mr. Douglas Nill reiterated that Plaintiffs are not asserting a labeling claim.

[2] Argument for Summary Judgment on the New Jersey Consumer Fraud claims, February 18, 2040. Defendant asserts that the Plaintiffs have no basis for a price discrimination claim and Plaintiffs agree they are not bringing a price discrimination claim.

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.

The purpose of the act is to prevent the deception and fraud, whether by actual "acts," or "omissions," in connection with sales or advertising of merchandise. *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 562 (N.J. 1994).

The Plaintiffs allege the Defendant has committed fraud and persisted in unconscionable commercial practices. The New Jersey courts define "unconscionable commercial practices" as a lack of "good faith, honesty in fact and observance of fair dealing." *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971). The Plaintiffs claim that Defendant committed fraud and unconscionable commercial practices in:

1. intentionally failing to notify the consumer and state departments of agriculture that Poast Plus® was registered with the EPA for use on minor crops;
2. publishing articles averring that it is illegal to use its products "off-label"; and,

3. marketing Poast Plus® and Poast®, two products that share the same active ingredient, as different products for different prices.

The Defendant asserts that their actions are permitted under federal regulations.

According to 7 U.S.C. § 136a, "no person in any State may distribute or sell to any person any pesticide that is not registered" under subchapter 136a. The Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") granted the EPA authority to regulate pesticide's labeling to ensure their compliance with the goals of FIFRA.[3] Once a pesticide has been approved by the EPA for distribution or sale, the pesticide is only marketable if it is also registered with the state it is to be sold in. 7 U.S.C. § 136v (states may regulate the sale or use of federally registered pesticides, so long as the states' conditions are not different from or in addition to those set by the EPA). Poast Plus® was never registered with any state for use on minor crops, it was only registered with the EPA. Poast® was registered for "major" and "minor" crops with the EPA and with state departments of agriculture.

Once a product is registered with the EPA, 40 C.F.R. § 152.130 et seq. allows registrants flexibility in labeling their products. If the product is registered with the EPA for a variety of uses, the product may be subset labeled for any of the approved uses, as long as "no changes would be necessary in precautionary statements, use classification, or packaging of the product." The Defendant has the right to chose whether or not to label Poast Plus® for use on minor crops. Had the Defendant labeled Poast Plus® for use on minor crops it would have been required to register with the state department of agriculture in the intended state of distribution.

---

[3] The goal of FIFRA to ensure proper labeling and minimal harm to the environment.

Defendant would be in violation of state law in labeling a pesticide that is not registered with the state. The Defendant's continued insistence that farmers were unable to use Poast Plus® for minor crops because it was not labeled for them, is not fraudulent, nor is it unconscionable. It would be illegal under federal law and state law to use a pesticide inconsistent with its label.[4] The Defendant does not have a duty to notify every consumer and every state department of agriculture whether their product has been registered with the EPA if they do not intend to register it with the state.[5]

The Plaintiffs have suffered no ascertainable loss as a result of Defendant's failure to disclose the crops Poast Plus® was registered for with the EPA. Had the Defendant disclosed that Poast Plus® was registered for minor crops with the EPA, Plaintiffs would still not have been able to use the product. Plaintiffs allege departments of agriculture for all fifty states would have registered for a 24(c)[6] to allow their farmers to use Poast Plus® off label. With the exception of Noah Dakota and South Dakota the Plaintiffs have failed to show that all states would have applied for and the EPA would have issued a 24(c) for price disparities. *O'Neil v. Kelly*, 239 N.W.2d 231, 232 (1976) (adverse party "may not rely on the possibility that he will be able to develop evi-

---

[4] 40 C.F.R. § 156.10. It is illegal in all fifty states to use, sell, or advertise a pesticide that is not registered in that state.

[5] 7 U.S.C. § 136, et seq.

[5] 40 C.F.R. § 156.10.

[6] Under Section 24(c) of FIFRA the federal government may grant states authority to issue special local needs registrations under certain conditions. Certain conditions must exist before the EPA will grant a 24(c) registration, and even then the EPA may disapprove the application. 40 C.F.R. § 162.151.

dence at trial, but must present specific admissible facts showing a material fact issue").

Plaintiffs' allegations that the Defendant published articles informing consumers that it is illegal to use the products in question "off label" use is not actionable. The Plaintiffs are not allowed to use pesticides off label; this is a true statement.[7] The statements do not constitute fraud or unconscionable commercial practices.

The Plaintiffs allege Poast® and Poast Plus® are the same product. Defendants, only for the purpose of the summary judgment motion, have agreed that the two products are the same. 40 C.F.R. § 152.113 allows manufacturers to register pesticide products with the same active ingredients, as separate products. The EPA issued separate registration numbers to Poast® and Poast Plus® considering them distinct compositions. This Court will not second-guess the EPA's decision.

Plaintiffs' allegations are not actionable under the New Jersey Consumer Fraud Act.

Based on the above reasoning and authority, this Court Hereby Grants Defendant's motions for summary judgment.

MJK

STATE OF MINNESOTA
SUPREME COURT

RONALD PETERSON, ET AL., *Respondents*,

vs.

BASF CORPORATION,
a foreign corporation, Petitioner, Appellant.

JUDGMENT

Appellant Court # C3-02-857

Trial Court # C297295

Pursuant to a decision of Supreme Court duly made and entered, it is determined and adjudged that the decision of the Normal County District Court herein appealed from be and the same hereby is affirmed and judgment is entered accordingly. A certified copy of the entry of judgment and the court's decision is herewith transmitted and made part of the remittitur.

It is further determined and adjudged that Ronald Peterson herein, have and recover of BASF Corporation, a foreign corporation, herein the amount of $358,053.28 as attorney fees in this cause.

It is further determined and adjudged that Ronald Peterson herein, have and recover of BASF Corporation, a foreign corporation, herein the amount of $22,638.61 as costs and disbursements in this cause, and that execution may be issued for the enforcement thereof.

DATED AND SIGNED:
JUNE 10, 2004

FOR THE COURT

Attest: */S/ FREDERICK K. GRITTNER*
Clerk of the Appellate Courts

By: */S/ KIRSTIN VANRISSEGHEM*
Assistant Clerk

STATEMENT FOR JUDGMENT

Costs and Disbursements in the Amount of: $22,638.61

Attorney Fees in the Amount of: $358,053.28

Total: $380,691.89

Satisfaction and Judgment filed: _____
Dated

Therefore the above judgment is duly satisfied in full and discharged of record.

ATTEST: */S/ FREDERICK K. GRITTNER* BY:_____
Clerk of the Appellate Courts Assistant Clerk

TRANSCRIPT OF JUDGMENT

I, Frederick K. Grittner, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,

In the City of St. Paul June 10, 2004
Dated

/S/ FREDERICK K. GRITTNER
Clerk of the Appellate Courts

BY: /S/ KIRSTIN VANRISSEGHEM
Assistant Clerk

United States Constitution, Article VI

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution of laws of any State to the contrary notwithstanding.

* * *

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * *

7 U.S.C. § 136a(a), (c)(5). Registration of pesticides

(a) Requirement of registration

Except as provided by this subchapter, no person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this subchapter and that is not the subject of an experimental use permit under section 136c of this title or an emergency exemption under section 136p of this title.

* * *

(c) Procedure for registration

* * *

(5) Approval of registration

The Administrator shall register a pesticide if the Administrator determines that, when considered with any restrictions imposed under subsection (d) of this section —

(A) its composition is such as to warrant the proposed claims for it;

(B) its labeling and other material required to be submitted comply with the requirements of this subchapter;

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

* * *

7 U.S.C. § 136j(a)(1), (2)(G). Unlawful acts

(a) In general

(1) Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person —

(A) any pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter;

(B) any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under section 136a of this title;

(C) any registered pesticide the composition of which differs at the time of its distribution or sale from its composition

as described in the statement required in connection with its registration under section 136a of this title;

(D) any pesticide which has not been colored or discolored pursuant to the provisions of section 136w(c)(5) of this title;

(E) any pesticide which is adulterated or misbranded; or

(F) any device which is misbranded.

(2) It shall be unlawful for any person —

* * *

(G) to use any registered pesticide in a manner inconsistent with its labeling

* * *

7 U.S.C. § 136v(a)-(b). Authority of States

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

* * *

40 C.F.R. § 152.130(a)-(b). Distribution under approved labeling

(a) A registrant may distribute or sell a registered product with the composition, packaging and labeling currently approved by the Agency.

(b) A registrant may distribute or sell a product under labeling bearing any subset of the approved directions for use, provided that in limiting the uses listed on the label, no changes would be necessary in precautionary statements, use classification, or packaging of the product.

* * *

40 C.F.R. § 156.10(a)(1). Labeling requirements

(a) General —

(1) Contents of the label. Every pesticide products shall bear a label containing the information specified by the Act and the regulations in this Part. The contents of a label must show clearly and prominently the following:

(i) The name, brand, or trademark under which the product is sold as prescribed in paragraph (b) of this section;

(ii) The name and address of the producer, registrant, or person for whom produced as prescribed in paragraph (c) of this section;

(iii) The net contents as prescribed in paragraph (d) of this section;

(iv) The product registration number as prescribed in paragraph (e) of this section;

(v) The producing establishment number as prescribed in paragraph (f) of this section;

(vi) An ingredient statement as prescribed in paragraph (g) of this section;

(vii) Hazard and precautionary statements as prescribed in subpart D of this part for human and domestic animal hazards and subpart E of this part for environmental hazards.

(viii) The directions for use as prescribed in paragraph (i) of this section; and

(ix) The use classification(s) as prescribed in paragraph (j) of this section.

* * *

New Jersey Consumer Fraud Act § 56:8-2. Fraud, etc., in connection with sale or advertisement of merchandise or real estate as unlawful practice

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.

(3)

No. 04-81

Supreme Court, U.S.
FILED
SEP 24 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Minnesota Supreme Court properly affirmed a unanimous jury verdict and held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) – a health and safety law – does not preempt plaintiffs' "fraudulent marketing" claims where evidence was presented that,

A. defendant BASF Corp. (BASF) engaged in a national "system of deceit" to exploit minor crop farmers by marketing the same herbicide as different products – Poast and Poast Plus – at different prices to extract inflated prices from minor crop farmers,

B. BASF lied to state regulatory authorities, food processors, farmers and dealers to conceal the Environmental Protection Agency (EPA) registration of cheaper Poast Plus for the same crops as Poast, with the same safety data,

C. EPA by its own edict in this case does not regulate fraudulent marketing – *"a company marketing decision in which EPA has no input . . . ,"*

D. BASF threatened, encouraged and allowed the criminal prosecutions of farmers for off-label use of cheaper Poast Plus as a "market[ing] . . . strategy" to "enforce" the use of expensive Poast herbicide on minor crops,

E. BASF considered the *"risk"* of farmers discovering the truth, and whether United States farmers could be *"controlled in future"* if BASF's fraudulent marketing and pricing schemes for Poast and Poast Plus were discovered, and

QUESTIONS PRESENTED – Continued

F. BASF's regulatory and marketing experts and management all conceded during trial that compliance with FIFRA has no bearing on whether a company deceptively and fraudulently markets a herbicide?

II. Whether the First Amendment prohibits consumers from pursuing a fraud claim against a company for "fraudulent marketing techniques" including evidence that the company deceived and lied to state regulatory authorities, food processors, farmers and dealers to conceal the EPA registration of Poast Plus for the same crops as Poast using the same safety data?

RULE 14.1(b) STATEMENT

1. Ronald Peterson
2. Barry Thune
3. Owen Larson
4. Owen Larson Farms, Inc.
5. Duane Evenson
6. Jeffrey Nesvig
7. Richard Moen
8. Christopher Grove
9. Christopher Grove Farms, Inc.
10. David Abentroth
11. Glenn Asbeck
12. Asbeck, Inc.
13. Donald Steinbeisser
14. Joe G. Steinbeisser & Sons, Inc.
15. Stephen Pust
16. Stephen Pust Farms, Inc.
17. All persons who purchased the herbicide Poast between January 1, 1992 and December 31, 1996 for use on their crops, except North Dakota residents who purchased Poast in North Dakota – who settled a separate class action lawsuit with BASF Corporation in 1997 for $3.5 million and national injunctive relief. *See, e.g.*, PX358 (national reduction in price of Poast)
18. BASF Corporation

RULE 29.6 STATEMENT

Class Representatives include Owen Larson Farms, Inc., Christopher Grove Farms, Inc., Asbeck, Inc., Joe G. Steinbeisser & Sons, Inc., and Stephen Pust Farms, Inc. These small family-owned farm corporations, incorporated in the States of Minnesota and Montana, have no parent companies and no publicly-traded stock.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents (Farmers) respectfully ask this Court to deny Petitioner BASF Corporation's (BASF) petition for a writ of certiorari to the Supreme Court of Minnesota as it is meritless.[1]

OPINIONS BELOW

The four state and federal court opinions all approving Farmers' claims are published below at *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004) (*Peterson III*); *Peterson v. BASF Corp.*, 657 N.W.2d 853 (Minn. App. 2003) (*Peterson II*); *Peterson v. BASF Corp.*, 618 N.W.2d 821 (Minn. App. 2000), *rev. denied* (Minn. Jan. 26, 2001) (*Peterson I*); *Peterson v. BASF Corp.*, 12 F.Supp.2d 964 (D. Minn. 1998).

STATEMENT OF THE CASE

This is a straightforward consumer fraud case brought under the New Jersey Consumer Fraud Act, §§ 56:8-1-56:8-116 (NJCFA) on behalf of farmers in all 50 states who purchased Poast herbicide from New Jersey-based BASF[2] in 1992-96, except for some North Dakota farmers who settled a separate class action lawsuit with BASF in 1997 for $3.5 million and national injunctive relief. *See, e.g.*, PX358 (national reduction in price of Poast).[3]

This case has been litigated for almost eight years with four published state and federal court opinions and a unanimous 12-member jury verdict adopted by the trial court

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[1] Eleven Minnesota appellate judges have studied the facts of this case as determined by the jury and unanimously rejected BASF's legal defenses.

[2] BASF is a subsidiary of a global German parent corporation, BASF Aktiengesellschaft (BASF AG), with yearly revenues exceeding $8 billion. The trial court conservatively excluded evidence that BASF and BASF AG were at the epicenter of recent major violations of antitrust and consumer laws (Clerk Doc. No. 493); Minn.R.Evid. 404(b).

[3] PX refers to Plaintiffs' (Farmers) trial exhibits and Tr. refers to trial transcript.

approving Farmers' claims that BASF engaged in a national "system of deceit"– intentional misrepresentations, unconscionable commercial practices, and omissions – by marketing the same herbicide as different products – Poast and Poast Plus – to extract inflated prices from minor crop farmers. *See Peterson III*, 675 N.W.2d at 63-64 ("BASF made material misrepresentations in advertisements ... [and engaged in many other] ... efforts to prevent farmers from learning that Poast Plus was approved for use on the same crops as Poast."); *Peterson II*, 657 N.W.2d at 866 ("jury could conclude that BASF's marketing scheme and exploitation of federal regulations, rather than its lawful use of federal regulations, concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the NJCFA"); *Peterson I*, 618 N.W.2d 821 (remanding *for a jury to determine* whether BASF's herbicide marketing and pricing schemes deceived farmers and wrongfully exploited the federal EPA and state regulatory process as a *"system of deceit"* to exact inflated prices from minor crop farmers); *Peterson*, 12 F.Supp.2d 964 (remanding to state court).

BASF never confronts extensive evidence of its outright misrepresentations and fraudulent concealment. The Minnesota Supreme Court, *Peterson III*, 675 N.W.2d at 70 (emphasis added), did confront the evidence:

> [F]armers argue that their consumer fraud claim is not based on BASF's labels but rather on fraudulent marketing techniques. The court of appeals agreed. It held that "the farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging." *Peterson II*, 657 N.W.2d at 865. Further, the court of appeals noted that "the farmers here were not asserting that BASF's registration and container labels were false or misleading, * * * [r]ather, the farmers' point was that *even if BASF's* labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops ...."

For example, the farmers presented evidence that BASF advertised Poast Plus as only "registered" for use on cotton, soybeans, peanuts, and alfalfa, and advertised that Poast was the "only" post-emergent grass herbicide registered for use on minor crops, *which a BASF executive candidly admitted was a material omission.* Additionally, BASF attempted to prevent word from spreading that Poast Plus was registered for use on minor crops. A BASF sales representative informed authorities that farmers were using Poast Plus on minor crops, BASF had its public relations firm submit a magazine article discussing increased enforcement of fines for failing to follow label recommendations, and BASF told the North Dakota Department of Agriculture that BASF could not add crops on the Poast label to the Poast Plus label because the EPA would require it to do further residue testing, which would cost the company millions of dollars. BASF's alleged unconscionable conduct went beyond the label and the reach of federal law. As an EPA representative stated in correspondence with the North Dakota Commissioner of Agriculture, the "*problem appears to stem from a company marketing decision in which the EPA had no input.*"

A. Summary Of Argument

BASF asks this Court to inappropriately extend preemption and First Amendment principles to shield conduct found by a jury to be based on "an unconscionable commercial practice, deception, fraud, false pretense, false promise" and "a knowing (intentional) omission, suppression or concealment of the truth." BASF's petition is frivolous in the face of unanimous Minnesota appellate rulings, entirely consistent with rulings of all courts across the land, rejecting BASF's arguments that fraudulent marketing schemes are preempted by federal health and safety law or immunized by the First Amendment.

1. This "Fraudulent Marketing" Case Has Nothing To Do With FIFRA Preemption Disputes Involving Injury To People And Crops

Farmers have never challenged the adequacy of the human safety warnings on the Poast and Poast Plus herbicide product labels (failure-to-warn), or the phytotoxicity of the product (crop injury), or the efficacy of the product (whether it works as intended). Nor do Farmers claim that BASF misled the EPA in its registration submissions. Farmers challenge only BASF's "fraudulent marketing" of its herbicide to consumers.

BASF misuses cases that have no relationship to Farmers' fraudulent marketing claims. For example, BASF misuses *Dow Agrosciences LLC v. Bates*, 332 F.3d 323 (5th Cir. 2003), *cert. granted*, 2004 WL 1431958 (U.S. June 28, 2004) (No. 03-388) (whether FIFRA preempts claims of peanut crop damage caused by pesticide), a FIFRA preemption case now before this Court. The "Question Presented" by this Court in granting the *Bates* petition for a writ (emphasis added): "Which, if any, state law ***crop injury claims*** are preempted by the [FIFRA]?" Farmers' claim that BASF fraudulently marketed its herbicide is as far removed from *Bates* – a crop injury case – as the earth is from the moon. Said the Minnesota Supreme Court in *Peterson III*, 675 N.W.2d at 70-71 (emphasis added), in analyzing evidence before the jury:

> As an EPA representative stated in correspondence with the North Dakota Commissioner of Agriculture, the "***problem appears to stem from a company marketing decision in which the EPA had no input***."

Again stated, Farmers challenge only the fraudulent marketing of BASF's herbicide to Farmers. There is absolutely no authority, much less a split in authority, supporting BASF's disregard of the EPA's own statements

in this case,[4] or its claim that Farmers' marketing and advertising fraud claims are preempted by FIFRA. BASF's federal preemption defense is nonsense.

2. First Amendment Never Protects Consumer Fraud

BASF also complains that this Court should extend the First Amendment to bar state regulation of fraudulent marketing schemes. The Minnesota Supreme Court would not even consider BASF's First Amendment argument. *Peterson III,* 675 N.W.2d at 65 (granting review "with the exception of BASF's First Amendment argument"). This Court recently recognized that "fraudulent marketing representations to charitable groups are not protected speech"). *Illinois ex rel. Madigan, Attorney General v. Telemarketing Assoc., Inc.*, 538 U.S. 600 (2003). No authority has ever conflicted with application of the *Madigan* principle to consumers. *See, e.g., Greater New Orleans Broadcasting Assn. v. U.S.*, 527 U.S. 173 (1999) (false, deceptive, or misleading advertising is not protected speech); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) (commercial speech not protected if intended to mislead); *Friedman v. Rogers*, 440 U.S. 1 (1979) (state can restrict deceptive or misleading commercial speech even if not provably false and partly true); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (even truthful commercial speech can be regulated by consumer fraud statutes); *State v. Leary*, 587 A.2d 85, 91-92 (Conn. 1991) (no First Amendment protection for evidence submitted to prove violation of Connecticut Unfair Trade Practices Act).

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[4] BASF's "ostrich-like" disregard of the EPA's pronouncements is unbecoming. *See, e.g., Mannheim Video, Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989) ("ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is unprofessional"); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988) ("ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist" requires Rule 11 sanctions).

B. Unanimous Jury Verdict Fully Adopted By Trial And Unanimous Minnesota Appellate Courts Confirms That BASF Engaged In A National "System Of Deceit" To Extract Inflated Prices From Minor Crop Farmers

BASF's misconduct and deceit arose when BASF's original product, Poast, faced competition in the national soybean (major crop) market. In the minor crop market, Poast had a dominant position. To meet competition in major crops, while retaining a premium price in minor crops, BASF deceptively devised Poast Plus and marketed expensive Poast to minor crop growers and cheaper Poast Plus to major crop growers. It was a market-segmentation scheme.

The EPA and BASF regarded Poast and Poast Plus as the same herbicide and both products were EPA-registered for the same crops based on the same residue safety data submitted to the EPA under oath by BASF. Both products were applied at the same amount of active ingredient per acre. BASF admitted in federal court and at trial that Poast was $4/acre ($32 per gallon of product) more expensive during the class period. *See, e.g., Peterson*, 12 F.Supp.2d at 967.

BASF's marketing misconduct was intentional. BASF deceived and lied to state regulatory authorities, food processors, farmers and dealers, to conceal a federal regulatory action, namely, the EPA registration of Poast Plus for the same crops as Poast, using the same safety data. BASF threatened, encouraged and allowed the criminal prosecutions of farmers for "off-label" use of cheaper Poast Plus as a "marketing strategy." BASF considered the "*risk*" of farmers and authorities discovering the true EPA registration status of Poast and Poast Plus, and whether United States farmers could be "*controlled in future*" if BASF's fraudulent marketing and pricing schemes for Poast and Poast Plus were discovered.

C. Unanimous *Peterson I* Reversed Summary Judgment For BASF And Remanded For Trial

Peterson I, 618 N.W.2d at 824 (emphasis added), rejected BASF's mutating federal preemption/regulatory compliance defense by distinguishing between regulatory compliance and consumer fraud:

> *BASF's registering of one herbicide for use on different crops was specifically permitted by the EPA.* 40 C.F.R. § 152.130(b) (1994). [Farmers] presented evidence, however, to suggest that BASF designed a plan *to conceal the fact that Poast Plus was EPA registered for use on minor crops* and to discourage any off-label use of Poast Plus . . . Thus, [farmers] have shown that a genuine issue of material fact exists as to whether *BASF's system of deceit* falls within the broad protection of the [NJCFA].

D. Minnesota Supreme Court Denies BASF Petition for Review

BASF petitioned the Supreme Court to review the Court of Appeals' *Peterson I* decision. BASF only argued causation defenses rejected by *Peterson I*, and did not petition for further review of its federal preemption/-regulatory compliance defense.[5] The Supreme Court denied BASF's petition.

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[5] BASF arguably waived any right to continue its federal preemption defense after it failed to seek further review on federal preemption before the Minnesota Supreme Court after the Court of Appeals' *Peterson I* ruling. *See, e.g., Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456-57 (8th Cir. 1990) (applying law-of-the-case doctrine to prevent litigation of issue decided by prior appellate ruling).

E. Unanimous 12-Member Jury Verdict And Common Fund Judgment

On December 6, 2001, 12 jurors unanimously found:

We, the jury in this case, find as a Special Verdict the following facts by way of answers to the following questions submitted to us by the Court:

1. Did Defendant BASF Corporation engage in an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's marketing and pricing strategies for Poast and Poast Plus herbicides?

   Answer: YES _X_ NO ___

2. Did BASF engage in a knowing omission, suppression or concealment of the truth in relation to BASF's marketing and pricing strategies for Poast and Poast Plus herbicides?

   Answer: YES _X_ NO ___

If you answered "Yes" to any one of Questions 1 and/or 2 above, then answer Question No. 3.

3. Did BASF's conduct or actions as you have found above cause an ascertainable loss to Plaintiffs?

   Answer: YES _X_ NO ___

If you answered Question No. 3 above "Yes", then go to Question No. 4.

4. What, if any, was the monetary value of Plaintiffs' loss caused by BASF's conduct or actions as you found above for the years 1992 to 1996?

   1992 $ 2,000,000
   1993 $ 5,000,000
   1994 $ 3,000,000
   1995 $ 4,000,000
   1996 $ 1,000,000

Clerk Doc.575. On April 2, 2002, the trial court entered a common fund judgment for Farmers. Clerk Doc.637.

F. Unanimous *Peterson II* Affirms Jury Verdict And Judgment

Peterson II, 657 N.W.2d at 853, rejected BASF's 34 appeal issues and affirmed the 12-member jury verdict and judgment.

G. Unanimous *Peterson III* Affirms Jury Verdict And Judgment

In a February 19, 2004 opinion, the Minnesota Supreme Court fully affirmed the jury award and judgment against BASF, stating:

> At trial, the jury was presented with a special verdict form and found by unanimous vote that BASF "engage[d] in an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's marketing and pricing strategies for Poast and Poast Plus herbicides" and "engage[d] in a knowing omission, suppression or concealment of the truth in relation to BASF's marketing and pricing strategies for Poast and Poast Plus."

Peterson III, 675 N.W.2d at 64.

STATEMENT OF FACTS

A. Poast And Poast Plus Are The Same Herbicide

Poast and Poast Plus are a post-emergence grass herbicide with the same active ingredient (sethoxydim), EPA approved for the same crops, based on the same residue test data, to control the same grasses, with the same applications and pounds of active ingredient per acre. Tr.2424:19-2425:10;2776:12-2777:13. BASF's EPA registration submission certified that Poast Plus was "tolerant" for the same minor crops as Poast. PX244 (field/forage/vegetables/fruits). BASF's Regulatory Affairs Director and its regulatory trial expert both testified that BASF would never EPA-register Poast Plus for minor crops without crop safety clearance studies. Tr.1340:14-18;1343:1-8;2673:6-12. Under the trade

name Vantage, Poast Plus was legally used on hundreds of varieties of minor crops across the country without crop injury (i.e., delicate roses, violets). Tr.3110:9-3117:1.

B. BASF's Scheme: "Opportunistically Exploit" Minor Crop Farmers

BASF's exploitation of minor crop farmers originated at BASF's New Jersey headquarters in 1988. Tr.1:19-25;13:1-25. BASF decided to price Poast at a premium for minor crop farmers and introduce the same herbicide, cheaper Poast Plus, to meet competition in major crops. BASF was concerned that its scheme would be uncovered, PX217 (emphasis added):

> Does it make sense to position Poast on a high price level in high value [minor] crops and introduce a 2nd grasskiller for soybeans, cotton, sugarbeet for example on a lower price level? ***Will the farmer be controlled in future?***

In 1989, at the direction of parent BASF AG, with instructions emanating from New Jersey headquarters, BASF implemented its exploitive United States' "marketing scheme." PX237. BASF's "Confidential" marketing plan for Poast included these predatory elements: "ACTIVE MARKET SEGMENTATION. OPPORTUNISTIC EXPLOITATION OF NON-SOYBEAN MARKET POTENTIAL." PX234 (emphasis in original).

By 1992, BASF had registered Poast Plus with the EPA as safe for use on the same minor crops as Poast. PX244;Tr.2149:8-2150:1;2424:19-2425:10. BASF attested to the EPA that no new residue studies were needed:[6]

> No new residue data is included and is not needed because *the proposed label directions for use in the above listed crops for Poast Plus are* ***identical*** *to those for the registered product Poast Herbicide* (EPA Reg. No. 7969-58) in terms

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[6] A company must demonstrate the relative safety of a herbicide as it relates to people and the environment. 40 C.F.R. § 158.20 (1993).

> of number of applications, pounds of active ingredient per acre, and PHI [preharvest interval].

PX244 (emphasis added); Tr.2684:22-2685:22. Poast and Poast Plus are indistinguishable when used by farmers except that Poast was $4.00/acre ($32.00/gallon) more expensive than Poast Plus. PX285;Tr.1291:11-1294:13; 2174:7-25;2236:1-2238:20.

C. BASF's Exploitation Scheme: Concealment Of Material Facts And Overt Lies

The EPA *and* BASF regarded Poast and Poast Plus as the same herbicide:

> *Any crops currently registered for use on the POAST label can be placed into the POAST PLUS label.* All that is needed is a proposed POAST PLUS label, containing that particular use, to submit to the EPA for approval.

PX336 (emphasis added). BASF concealed from farmers and agriculture officials – and lied when directly confronted – the truth that Poast and Poast Plus were EPA-registered for the same crops. Tr.1876:1-1879:5. BASF's "secret"[7] registration for Poast Plus was a marketing decision. PX336. The motive for the deception is explained in an October 23, 1992 memo from BASF's public relations firm to BASF's marketing division: "***[W]e run the risk of some people knowing*** POAST PLUS is also registered, but not labeled, for [minor crops]." PX41 (emphasis added).

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[7] North Dakota Agriculture Commissioner Sarah Vogel detailed, to the EPA, North Dakota's discovery that BASF had lied about the Poast Plus registration, PX365 (emphasis added):

> On May 18, 1994, I received a letter from Mr. Sanders [of the EPA] stating, '. . . the crops, which appear on the Poast label, were accepted [registered] for use on the Poast Plus label in 1992. Your problem appears to stem from ***a company marketing decision in which the EPA had no input.***' . . . This was the first time that the Department of Agriculture learned about BASF's ***secret*** label.

To conceal the EPA registration of Poast Plus and advance its "Opportunistic Exploitation" scheme, BASF's marketing was blatant lies and half-truths. BASF claimed through advertising materials that Poast was the "only" product with registered residue tolerances for minor crops. Tr.2151:22-2152:8;2172:7-17. BASF's product line catalog deceptively stated: "Poast Plus for postemergence grass control in multiple crops. *Registered* for use on cottons, soybeans, peanuts, alfalfa." PX270 (emphasis added); Tr.445:6-20. BASF executives testified that it was not appropriate to use the term "registered." Tr.2223:6-12;445:8-20;461:7-21. BASF's concealment and lies regarding the EPA's registration of Poast Plus for minor crops was perpetuated through publications, radio spots, ad slicks, bill stuffers, and postcards directed at minor crop farmers:

> ***Sugarbeets***
>
> "Controls more grasses than any other sugar beet herbicide." PX263;264.
>
> ***Dry Beans***
>
> "Poast is the only over-the-top grass herbicide developed for dry beans." PX263;264.
>
> ***Vegetables***
>
> "For grass control in vegetables, Poast herbicide stands alone. No other herbicide, pre or postemergence, controls so many grasses in all these varieties." PX263;264.
>
> ***Potatoes***
>
> "Controls more grasses than any other potato herbicide." PX263;264.
>
> ***Flax and Sunflowers***
>
> *"Poast from BASF is the only postemergence herbicide registered for use in flax and sunflowers."* . . . "Grass control like never before." PX256 (emphasis added). "Poast from BASF is *the only postemergence herbicide registered for use in flax.*" PX263;264 (emphasis added).

These promotional pieces misrepresented and concealed that Poast Plus was registered with the EPA for the

same crops to control the same grasses, based on the same residue safety data submitted for Poast. Tr.2772:17-25. "As far as what the plant sees, they'd see the same amount of active ingredient." Tr.2777:4-5;1567:19-25;1568:1-25;1569:1-9. "Opportunistic Exploitation" of minor crop farmers remained the driving force behind BASF's marketing of Poast. PX247.

BASF's scheme was effective. Class representatives testified they were misled by Poast and Poast Plus advertisements (Tr.1183:25-1185:1-11;1287:9-1288:5;1445:25-1446:3; 1670:11-22) and representations by BASF field representatives at growers' meetings (Tr.1395:25-1396:17;1443:10-1445: 15;1644:18-1645:2;1669:13-1670:10;2169:2-17). Farmers did not understand they had been deceived by BASF until North Dakota and South Dakota uncovered BASF's marketing fraud and allowed farmers to use Poast Plus on minor crops, and commencement of the North Dakota class action. Tr.1292:7-1294:23;1448:24-1449:7;1643:15-1644:17;2172: 9-17;2198:6-24.

D. BASF's Enforcement Scheme: Criminal Prosecution Of Farmers As A "Marketing" Strategy – While Deceiving Farmers, Distributors, Processors And Regulatory Authorities

To exploit minor crop farmers, BASF recognized that it must actively enforce the use of Poast Plus only on major crops. PX247;250. BASF knew that if farmers realized that cheaper Poast Plus was the same herbicide as Poast and EPA registered for the same crops, farmers would question the use of expensive Poast. PX251;Tr.2172:18-24. If BASF could not prevent the use of cheaper Poast Plus on minor crops, it would experience millions of dollars in lost profits on the same sales volume. PX247. BASF recognized that the greatest risk for losing control – ***"will the farmer be controlled?"*** – were areas, like the Red River Valley of Minnesota/North Dakota, where the same farmers grow major and minor crops side-by-side and purchased Poast and Poast Plus. PX247;251.

BASF urged that farmers be criminally prosecuted for "off-label" use of cheaper Poast Plus on minor crops (PX258;Tr.1863:12-21) – not pursuant to the EPA's underlying taxpayer mandate to regulate the safety of herbicides for man and the environment – but criminal prosecution for "off-label" use only pursuant to BASF's "market[ing] . . . strategy" to "enforce" the use of expensive Poast herbicide on minor crops.[8] PX82;300;Tr.2011:16-2012:6;2012:14-2013:21;2022:1-2024:24;2026:3-2033:12.

Acknowledged BASF's registration specialist in a May 11, 1995 internal memorandum: "We already have a registration for POAST PLUS in sunflowers, but we [marketing] have chosen not to include the use in our current label." PX336. Enforcement of BASF's marketing ploy to restrict the Poast Plus label became the means for BASF's enforcement of its "Opportunistic Exploitation" of minor crop farmers. PX333;300;Tr.1863:12-21.

BASF even sent mailings to 5000 food processors and over 3000 dealers under the guise of maintaining the "safety of the food supply" and stewardship. In the mailing, BASF listed the four major crops on the Poast Plus label as its EPA registration (approved "residue tolerances"), while omitting that Poast Plus was EPA-registered with the same "residue tolerances" for the same minor crops as Poast. PX35;249. The fraudulent purpose of these mailings was to enlist food processors and dealers to restrict the use of Poast Plus to only the major crops in order to "***protect the food supply***" and "***avoid residue problems***." *Id.* Yet, BASF had already certified to the EPA that there were no residue or crop safety (tolerance) problems in using Poast Plus on minor crops. Tr.2684:22-2685:22. BASF fraudulently and unconscionably used food processors and dealers to enforce its "Opportunistic Exploitation" of minor crop farmers and conceal the EPA registration of Poast Plus. PX249.

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[8] FIFRA provides the EPA and state agriculture departments with enforcement mechanisms for violations of product labels ("off-label" use), including civil administrative penalties and criminal sanctions and fines. 7 U.S.C. § 136j-m.

To further reinforce the risk of off-label use of Poast Plus, BASF used its public relations firm to ghostwrite an Article disseminated nationally, warning of the risks of "off-label" use while concealing the fact that the article was paid for by BASF. PX253;Tr.1857:13-1858:13. A BASF Position Paper was simultaneously mailed to a wide variety of agencies and processors involved with minor crops that could influence farmers regarding off-label use of Poast Plus. PX252A;394. The Article and Position Paper stressed "hefty fines" for off-label use and the dangers to consumers and the environment (PX252A;253B), even though BASF knew that Poast Plus was EPA approved as safe for use on the same crops as Poast. PX244. To perpetuate its lies regarding the EPA registration of Poast Plus for use on minor crops, the Position Paper falsely stated that Poast was, "[T]he ***only*** postemergence ***product registered*** to control grasses in [minor crops] . . ." PX252A (emphasis added); Tr.3588:15-24.

E. BASF's Deceit Unravels: Farmers And State Officials React When Truth Of EPA Registration Of Poast Plus is Uncovered.

BASF's own sales force predicted that BASF's fraudulent "Opportunistic Exploitation" scheme would fail. PX402 (emphasis added); Tr.2232:3-2233:3:

> One more group can be added to the growing list of people who are not happy with the ***sethoxydim market segmentation scheme*** from BASF. A research agronomist from Pillsbury Green Giant called to discuss quote "the similarity between the two sethoxydim formulations." To him, it was very clear that their company and the food processors in general were being singled out and asked to pay a much higher price for post emergence grass control.

The grim concern of BASF and parent BASF AG at the dawn of the scheme – ***"Will the farmer be controlled in future"*** – proved prescient. PX217. Minor crop farmers began disregarding BASF's container (marketing) label

restricting Poast Plus to major crops. PX251;276;384 (BASF memo describing scheme as "becoming transparent") (emphasis added).

BASF egregiously enacted a strategy to use agriculture departments to perpetuate BASF's "Opportunistic Exploitation" scheme using state agriculture inspectors to "monitor and enforce the use of Poast over Poast Plus" on minor crops. PX333. BASF turned in its own dealers to Agriculture Inspectors for selling Poast Plus to minor crop farmers. PX258. This resulted in "hefty fines" to dealers and farmers despite the fact that EPA approved Poast Plus safe on minor crops. PX258. As prosecutions increased, BASF took the extreme step of lying to state Agriculture Departments regarding EPA registration of Poast Plus. *See, e.g.*, PX74;335. For example, BASF executives lied to the North Dakota Pesticide Control Board ("Control Board") to conceal the EPA registration of Poast Plus for the same crops as Poast. Tr.1876:1-24;1877:20-24;1929:2-18. A BASF memorandum noted the need to "develop a strategy" ***if North Dakota officials had already learned the truth***:

> North Dakota State has indicated that they have requested information from EPA *and may know* by the time of the March 28 meeting that *Poast Plus is also labeled in all these crops and that BASF has chosen not to extend this label to the marketplace*. . . . This will involve some *nebulous argumentation* . . . that EPA could request side-by-side residue work for Poast Plus and Poast.

PX71 (emphasis added).

Minutes of the March 1994 Control Board demonstrate BASF's overt lies:

> *BASF was asked if they could expand the Poast Plus label* [to all minor crops on the Poast label]. *They said they could not* because of economics. When questioned on whether the EPA may allow them to expand the Poast Plus label based on the current residue package submitted on sethoxydim, *BASF did not know*. However, they feared if they put this issue to question with the EPA, *the*

> *EPA may require BASF to do residue testing for the Poast Plus as well.*

PX73 (emphasis added); Tr.1888:25-1889:12. The Control Board wrote the EPA to determine if Poast Plus *could be registered* for use on minor crops. The EPA responded:

> A review of our records indicate that the crops, which appear on the Poast label, were accepted (registered) for use on the Poast Plus label in 1992. Your problem appears to stem from ***a company marketing decision in which EPA has no input.***

PX82 (emphasis added); Tr.1888:25-1890:7. A confidential internal BASF memorandum to BASF management states that the EPA was upset that BASF had deceived the Control Board:

> Mr. Taylor (EPA) told me he did not appreciate getting put in the middle of this issue since ***it is related to a marketing strategy and is not a regulatory matter***. Furthermore, EPA has already granted registration of POAST PLUS in most of the crops for which POAST is labeled, without requiring additional residue data from BASF. Mr. Taylor knows that the statement made to Ms. Vogel and attributed to BASF is ***incorrect***, and ***he is not pleased that BASF misdirected her*** as to where the issue really lies.

PX334 (emphasis added). At trial, a BASF executive, ***admitted that the statements he and another BASF executive made to the Control Board were false***, but that he ***was told*** to make them by senior executive William Wisdom. Tr.458:1-23.

As BASF turned in dealers and farmers for off-label use of Poast Plus, minor crop farmers petitioned regulators for the right to use cheaper Poast Plus. PX396;397. After BASF's lies were uncovered by North and South Dakota authorities, PX261, North and South Dakota issued 7 U.S.C. § 136v(c)(1) (Rule 24(c)) registrations to

use cheaper Poast Plus on minor crops.[9] PX298;129. Although BASF opposed the Rule 24(c) labels, BASF's own trade and lobby organization (American Crop Protection Association) refused to support BASF's opposition. PX291. Commissioner Vogel bluntly responded to BASF's opposition: *"[BASF] has eroded public respect for the registration process."* PX291 (emphasis added).

The EPA rejected BASF's opposition. PX132;Tr.2669:17-2670:20;Tr. 2689:5-9. Minnesota and Montana officials also considered a Rule 24(c) label for Poast Plus after learning that North and South Dakota had done so. PX133;300;313 ("[BASF] believe[s] the state of Minnesota may also have granted a 24(c) registration for Poast Plus for the same uses."). The matter was rendered moot for *Minnesota and all other states* because, after the actions of North and South Dakota and commencement of the *Tompkins* class action in North Dakota, BASF reduced the price of Poast to equal Poast Plus nationwide in 1997 (Clerk Doc. 563):

> C. Price Reduction. After filing of Plaintiffs' lawsuit, in contemplation of the 1997 growing season, BASF Corporation determined unilaterally to effect a nationwide price reduction of the Poast Product, thereby causing the price of Poast to be equivalent to the price of Poast Plus on a per acre basis. Clerk Doc. 563.

F. BASF's Deceit Was Complete

Said a unanimous *Peterson II*, 657 N.W.2d at 862:

> The farmers showed that BASF engaged in an advertising campaign claiming that only Poast was registered with the EPA for minor crops, despite the fact that Poast Plus was EPA-registered for the same minor crops. Other evidence showed

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[9] BASF's reaction to the North and South Dakota 24(c) registrations was predatory and predictable. BASF, through a personal telephone call from Executive William Wisdom, maliciously threatened to personally sue North Dakota Commissioner Vogel. Tr.1758:15-1759:15.

that BASF used mailings to food processors and dealers, an article submitted to *The Sugarbeet Grower* magazine, and a position paper emphasizing the dangers of "off-label" use, despite the fact that Poast Plus had been approved for minor corps. In another strategy, BASF turned in its own dealers to the North Dakota agriculture inspectors for selling Poast Plus to minor-crop farmers in violation of state pesticide laws, leading to criminal prosecutions of dealers and farmers. Further, the farmers introduced evidence to show that BASF personnel lied to the North Dakota Pesticide Control Board to conceal the fact that Poast Plus was EPA-registered for the same crops as Poast. Once the board learned from EPA officials that this was merely a marketing strategy, North Dakota, as well as South Dakota, obtained so-called "rule 24(c)" special local needs registrations with the EPA, allowing their farmers to use Poast Plus on minor crops.

Testified Farmers' FIFRA expert, Dr. Charles Benbrook: "It was, for approximately a five-, six-year period, price gouging." Tr.1939:17. Commissioner Vogel and Jack Peterson, head of pesticide enforcement for North Dakota, bluntly and repeatedly testified that BASF had lied to them: ***"[I] can take hard answers, but don't lie. Just – you don't lie."*** Tr.1878:5-6;1559:16-25;1566:17-25;1567:1;1681:17-25;1682:1-3. BASF's management conceded that BASF's marketing for Poast Plus was misleading (Tr.3588:15-24):

A. (Chris Coombs) (reading from BASF marketing materials) Okay. Poast Plus is registered for use on the following crops only. Cotton, soybeans, peanuts and alfalfa.

Q. ***Stop there. Do you consider it to be a material omission to say that Poast Plus is registered for use on the following crops only, cotton, soybeans, peanuts and alfalfa, when you knew that it was registered on all of the same crops as Poast?***

A. ***Yes, I would consider that.***

ARGUMENT

I. THREE UNANIMOUS MINNESOTA APPELLATE COURTS COMPLETELY REJECTED BASF'S COMPLAINTS THAT CONSUMER MARKETING FRAUD AND UNCONSCIONABLE COMMERCIAL PRACTICES ARE PREEMPTED BY FEDERAL HEALTH AND SAFETY LAW OR IMMUNIZED BY THE FIRST AMENDMENT

A. BASF's Consumer Fraud Is Established

BASF cannot argue established facts. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("in the absence of exceptional circumstances, we would defer to the state-court factual findings"); *Graver Mfg. v. Linde Co.*, 336 U.S. 271, 275 (1940) ("[this Court] cannot . . . review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.").

B. Fraudulent Marketing And Advertising Claims Are Never Preempted

1. EPA Pronounced BASF's Marketing Scheme Was Not Preempted

Peterson I, II and *III* completely rejected BASF's argument that BASF's technical compliance with the EPA and state registration process preempts Farmers' consumer fraud claims under FIFRA. *Peterson III*, 675 N.W.2d at 70; *Peterson II*, 657 N.W.2d at 864-67; *Peterson I*, 618 N.W.2d 821. The EPA itself pronounced BASF's marketing scheme is not EPA regulated: "***Your problem appears to stem from a company marketing decision in which EPA has no input.***" PX82 (emphasis added).[10]

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[10] In *Tompkins*, the North Dakota class action litigating the facts of this case, the U.S. District Court for North Dakota efficiently *dismissed* BASF's federal preemption argument, stating in a July 12, 1996 Order: "This case is not as much about labeling and packaging ***as it is about pricing and marketing.***" Clerk Doc. 77 (emphasis added) (Farmers' Appendix, 1a-2a).

2. EPA's Pronouncement Fully Accords With FIFRA Savings Clause And This Court's Rulings

The EPA registration and product label process for pesticides is intended to *protect the safety of people and the environment* – not deceptive marketing schemes. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984) (Congress enacted the 1972 FIFRA amendments "[b]ecause of mounting public concern about the safety of pesticides and their effect on the environment [and to] *safeguard[ ] the public interest.*") (emphasis added). The EPA does not protect corporate greed or shield companies from state consumer fraud claims. 7 U.S.C. § 136v. (FIFRA savings clause expressly permits state regulation of the sale – marketing and advertising – of pesticides) (emphasis added); Fed. Reg. 1122-25 (Jan. 11, 1989) (preamble to regulations codified at 40 C.F.R. §§ 116.7, 168.22 (*FIFRA does not grant the EPA authority over advertising of herbicides*); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 613-14 (1991) (FIFRA does not usurp historic State police powers to regulate pesticide sales).

3. BASF's "Opportunistic Exploitation" Of Minor Crop Farmers Was A "Marketing" Decision

As recognized in *Peterson I*, 618 N.W.2d at 824, the EPA permits a company to register an approved set of uses for a single active pesticide ingredient but container label the product sold to consumers for only some and not all of the registered uses. 40 C.F.R. §§ 152.113 and 152.130(b) ("split and subset labeling"). The EPA also allows companies to register alternate brand names for a registered product. FIFRA § 3(e).

The EPA does not ascertain the reasons why companies choose to split or subset label their pesticides, beyond a demonstration that a split or subset label "*would not significantly increase the risk of any unreasonable adverse effect on the environment.*" 40 C.F.R. § 152.113(b) (emphasis added)

(Farmer's Appendix, 1a-2a). Simply stated, the EPA does *not* address company marketing and pricing practices. And the EPA certainly does not address or condone schemes to fraudulently market one herbicide as different products at radically varying prices, to extract inflated prices from targeted segments of the unknowing consumer market. Acknowledged BASF's registration specialist in a May 11, 1995 internal memorandum: "We already have a registration for POAST PLUS in sunflowers, but ***we [marketing] have chosen not to include the use in our current label.***" PX336 (emphasis added). A confidential internal BASF memorandum to BASF management states that the EPA was upset that BASF had deceived the Control Board: "Mr. Taylor told me he did not appreciate getting put in the middle of this issue since ***it is related to a marketing strategy and is not a regulatory matter.***" PX334 (emphasis added). The Minnesota courts succinctly captured the heart of the dispute:

> [F]armers argue that their consumer fraud claim is not based on BASF's labels but rather on fraudulent marketing techniques. The Court of Appeals agreed. It held that "the Farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging." *Peterson II*, 657 N.W.2d at 865.

Peterson III, 675 N.W.2d at 70.

4. BASF's State Registration "Marketing" Schemes Were Part-And-Parcel Of BASF's National "System Of Deceit"

BASF's state registration strategies for Poast and Poast Plus were a continuum of BASF's "fraudulent marketing" scheme to "opportunistically exploit" and extract an inflated price from minor crop growers nationwide. *Peterson II*, 657 N.W.2d at 867 (jury could conclude that BASF's state registration decisions were part of BASF's national system of deceit); *see, e.g.*, PX117 (BASF

July 3, 1995 internal memorandum discussing BASF's "market strategies" of "differential pricing of the same active ingredient" and the option of BASF foregoing future Poast state registrations in North Dakota – "label off the state of North Dakota" – to punish the state for its actions after uncovering BASF's fraud).

5. BASF's Regulatory And Marketing Experts And Management Conceded At Trial That Regulatory Compliance Has No Relation To Consumer Fraud

During trial, BASF's regulatory and marketing experts and management conceded that the EPA and state herbicide regulatory process has no relation to whether a company deceptively and fraudulently markets and sells a product:

BASF's EPA regulatory expert – Daniel Barolo

Q. And the same thing would be true of ***a company who went through all the process of registering a crop with both the EPA and states, they could still commit consumer fraud***.

A. ***I presume they could.***

Tr.2493:3-5;2493:19-25;2494:1-5.

BASF's marketing expert – Dr. Dale Dahl

Q. That is ***regardless of whether or not your product is registered with either the EPA or the state, because they're separate registrations, a company can still commit consumer fraud by lying about its product; right?***

A. ***Sure.*** Just like a farmer could commit consumer fraud too.

Q. Okay. ***So patents, consumer fraud, doesn't cover it. Registration, consumer fraud doesn't cover it. Differential pricing, consumer fraud doesn't cover it. In***

other words, you're not protected from committing consumer fraud.

A. *Right.*

Tr.3145:1-5;3145:21-25;3146:1-10.

BASF's management – William Wisdom

Q. And *whether the label was proper or not, BASF could still commit consumer fraud; right?*

A. *I suppose so.*

* * *

Q. And *you will agree and tell the jury that the EPA does not concern itself with BASF's marketing practices, does it?*

A. *That's correct.*

Q. *But consumer fraud laws do, don't they?*

A. *Yes, sir.*

Q. *The EPA registration process that we have been talking about does not concern market[ing]; right?*

A. *That's correct.*

Tr.821:11-18;827:17-25.

6. BASF Misuses Cases Involving Injury To People And Crops And Fraud Upon The EPA

Farmers have never challenged the adequacy of the safety warnings on the Poast and Poast Plus herbicide product labels (failure-to-warn), or the phytotoxicity of the product (whether it harms the crop), or the efficacy of the product (whether it works as intended). Nor do Farmers claim that BASF misled the EPA in its registration submissions. Farmers challenge only BASF's fraudulent marketing of Poast/Poast Plus. BASF misuses cases that have no relationship to farmers' fraudulent marketing claims:

Failure-To-Warn Cases

- *Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir.), *cert. denied*, 537 U.S. 949 (2002) (injury to horse rider caused by use of insecticide on horse);
- *Lewis v. American Cyanamid Co.*, 715 A.2d 967 (N.J. 1998) (injury to homeowner caused by insecticide foggers);
- *Grenier v. Vt. Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996) (injury to homeowner caused by use of pesticide to preserve wood);
- *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) (injury to workers caused by pesticide);

Phytotoxicity Cases

- *Dow Agrosciences LLC v. Bates*, 332 F.3d 323 (5th Cir. 2003), *cert. granted*, 2004 WL 1431958 (U.S. June 28, 2004) (No. 03-388) (injury to peanut crop caused by herbicide);
- *Etcheverry v. Tri-Ag Serv., Inc.*, 93 Cal. Rptr. 2d 36 (Cal. 2000) (injury to walnut crop caused by insecticide);
- *Kuiper v. Am. Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997) (injury to corn crop caused by herbicide);
- *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995) (injury to cotton crop caused by herbicide);
- *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993) (injury to corn crop caused by herbicide);
- *Mortellite v. Novartis Crop Protection, Inc.*, 278 F.Supp.2d 390 (D.N.J. 2003) (injury to blueberry crop caused by herbicide);
- *Dahlman Farms, Inc. v. FMC Corp.*, 240 F.Supp.2d 1012 (D.Minn. 2002) (injury to corn crop caused by herbicide);

Fraud On EPA Cases

- *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (fraud by company in registration submissions to EPA);
- *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1100 (9th Cir. 2002) (fraud by company in registration submissions to EPA).

BASF's misused cases were easily addressed by the Minnesota appellate courts and do not present any reason for this Court to grant certiorari. *Peterson III*, 675 N.W.2d at 70 (consumer fraud claims based on "fraudulent marketing techniques" rather than label representations are not preempted); *Peterson II*, 657 N.W.2d at 865 (emphasis in original) ("*even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops, when, in fact, it was EPA-registered for both major and minor crops.").

C. First Amendment Never Protects Consumer Fraud

BASF isolates and disingenuously argues a bit of evidence in its "system of deceit" as protected by the First Amendment. *Peterson I*, 618 N.W.2d 821 ("*system of deceit*" to exact inflated prices from minor crop farmers). This case, a marketing fraud case with victimized consumers, is radically different from the use a consumer fraud statute by an ideologue with no personal injury to engage a *public policy* debate, an issue raised but not decided in *Nike v. Kasky*, 539 U.S. 654 (2003).

1. BASF Engaged In A "System Of Deceit"

BASF purports the judgment below "rests on a holding that petitioner's truthful speech was 'unconscionable.'"[11] Pet.

[11] "*Unconscionable*" has been defined in identical fashion by the New Jersey (NJCFA) and United States Supreme Courts. *See, e.g., D'Ercole Sales. Inc. v. Fruehauf*, 501 A.2d 990, 1000 n. 3 (N.J. Super.

(Continued on following page)

23. BASF distorts the record. The Minnesota Supreme Court observed there was evidence before the jury of "material [marketing] misrepresentations" and "less than candid responses" regarding the registration status of BASF's products. *Peterson III*, 675 N.W.2d at 70. The jury returned a special verdict finding that BASF had engaged in "deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's marketing and pricing strategies" and a "*knowing* omission, suppression or concealment of the truth" as part of its marketing scheme.[12] Clerk Doc. 575 (emphasis added). When the truth came out, enforcement officials were outraged, Tr. 1573-74;1829-1830;1878, and BASF's entire marketing scheme unraveled.

Malicious commercial deceit is never protected by the First Amendment. *Illinois ex rel. Madigan, Attorney General*, 538 U.S. 600; *Greater New Orleans Broadcasting Assn.*, 527 U.S. 173; *Central Hudson Gas & Elec. Corp.*, 447 U.S. 557; *Friedman*, 440 U.S. 1; *Lorillard Tobacco Co.*, 533 U.S. 525. It is no wonder that the Minnesota Supreme Court would not even hear BASF's indecent First Amendment claim.

2. BASF Deceived And Lied To State Regulatory Authorities, Food Processors, Farmers And Dealers While Threatening Criminal Prosecutions Of Farmers For Off-Label Use Of Cheaper Poast Plus As A "Market[ing] . . . Strategy" To "Enforce" The Use Of Expensive Poast Herbicide On Minor Crops

BASF complains its reports of off-label pesticide use to regulatory officials to maliciously "enforce" its "opportunistic

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1985) (defining unconscionable commercial practices pursuant to *Federal Trade Commission v. Sperry & Hutchinson*, 405 U.S. 233, 244 (1972), as practices contrary to public policy, or immoral, unethical, oppressive, or unscrupulous).

[12] BASF's petition only acknowledges a finding of "unconscionable commercial practice" and not the jury's findings of intentional acts of fraud.

exploitation" scheme can't support its liability.[13] Whatever protection the First Amendment might provide to corporate efforts to suborn government aid to enforce a fraudulent market segmentation scheme, surely that protection cannot cover intentional misrepresentations to a government agency to perpetrate the "system of deceit." The evidence is compelling: BASF deceived and lied to state regulatory officials, food processors, farmers and dealers. Testified North Dakota Agriculture Commissioner Vogel:

> A. That's right. I mean, there's like a – *just a number of lies [by BASF]* and in the meantime we had been out in good faith prosecuting – prosecuting farmers, using state police power to – *prosecuting farmers for doing things that were in fact legal and that the company knew all along was legal. And I felt very much that we had been duped.*

Tr. at 1559:16-251;1566:17-25;1567:1.

BASF appeared before the Control Board in 1995 with its "nebulous argumentation" strategy – lies – that Poast Plus was not registered for minor crop use and that the EPA would require expensive residue testing. The Control Board later learned the truth from the EPA, that less expensive Poast Plus had been registered for the same minor crops as Poast by the EPA in 1992, based on "the same residue testing." The EPA registration manager for

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[13] BASF cites cases applying the *Noerr-Pennington* doctrine. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (effort to exercise government power, even to gain an anti-competitive advantage, generally does not create liability under antitrust laws). The *Noerr-Pennington* doctrine, based on statutory considerations, is broader than any constitutional protection for communications to government. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 384 (1991) (defendant's conduct immune from antitrust liability under *Noerr-Pennington* but remanded for consideration on merits of state law claim). BASF's reliance on this antitrust doctrine – inapplicable to this consumer fraud case – illustrates there is no First Amendment protection for intentional corporate misrepresentations to state regulatory officials and consumers to enforce a fraudulent marketing scheme. *See, e.g., Illinois ex rel. Madigan*, 538 U.S. at 612 ("[l]ike other forms of public deception, fraudulent charitable solicitation is unprotected speech.").

Poast/Poast Plus informed BASF he was "***not pleased that BASF misdirected***" North Dakota officials.

Peterson II properly rejected BASF's argument that its ghostwritten magazine article and testimony about the reports to law enforcement should have been excluded from evidence. *Peterson II*, 657 N.W.2d at 871-73. This evidence was entirely relevant as part of the proof of BASF's "system of deceit." *Leary*, 587 A.2d at 91-92 (no First Amendment protection for evidence submitted to prove violation of Connecticut Unfair Trade Practices Act). Despite BASF's repugnant claim that the lower courts committed "an egregious and inexplicable" constitutional error, Pet. 27, BASF never claims the decision creates a conflict with other state court or federal circuit rulings. All courts agree that the First Amendment offers no shield to fraudulent and immoral marketing schemes.

3. Unlike *Nike*, This Case Does Not Present Use Of A Consumer Fraud Statute By An Ideological Citizen With No Personal Injury To Engage A *Public Policy* Debate

In *Nike*, a plaintiff filed suit under a state deceptive practices statute alleging the corporate defendant made misleading statements in the media about its overseas labor practices. The complaint acknowledged these statements did not personally harm the plaintiff. *Nike*, 539 U.S. at 656. The statements concerned matters "of [public policy]" in which the "participants advocated, or opposed, public collective action." *Id.* at 677. There was concern about the arguable unique use of a state fraud statute with no direct injury by the plaintiff to affect a public policy debate unrelated to sale of the defendant's product. *Id.* at 679 (Breyer, J., dissenting) ("purely ideological plaintiff").

One can hardly imagine a case further removed from *Nike* than this consumer fraud case. BASF's deceptions did not engage a public debate about regulatory policy. The plaintiffs here are not ideological with no direct harm. They are at the opposite end of the spectrum: Farmers who were defrauded of millions of dollars by BASF's cunning "system of deceit." Any suggestion that this case even remotely raises First Amendment concerns is facetious.

CONCLUSION

BASF's "system of deceit" was addressed by the Fargo (ND) *Forum* editors in a 1996 newspaper editorial, after BASF's Poast/Poast Plus marketing deceit was uncovered by the North Dakota Department of Agriculture:

> Shame on chemical company. . . . Its not just the money. BASF has been caught with their pants down. They have seriously undermined farmer confidence in the ***honesty*** of chemical companies and the ***integrity of safety rules***. Shame on them.

Clerk Doc. No. 562 (emphasis added).

BASF's petition is frivolous. Victimized Farmers are dying, retiring and losing their ability to prove a claim from the long-ago class period of 1992-96, while BASF exercises this last-gasp effort to delay payment of the money judgment. The petition should be promptly denied.

Respectfully submitted,

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September 24, 2004

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40 C.F.R. § 152.113 Approval of registration under FIFRA sec. 3(c)(7) – Products that do not contain a new active ingredient.

(a) Except as provided in paragraph (b) of this section, the Agency may approve an application for registration or amended registration of a pesticide product, each of whose active ingredients is contained in one or more other registered peticide [sic] products, only if the Agency has determined that:

(1) It possesses all data necessary to make the determinations required by FIFRA sec. 3(c)(7)(A) or (B) with respect to the pesticide product which is the subject of the application (including, at a minimum, data needed to characterize any incremental risk that would result from approval of the application);

(2) Approval of the application would not significantly increase the risk of any unreasonable adverse effect on the environment; and

(3) The criteria of § 152.112(a), (d), and (f) through (h) have been satisfied.

(b) Notwithstanding the provisions of paragraph (a) of this section, the Agency will not approve the conditional registration of any pesticide under FIFRA sec. 3(c)(7)(A) unless the Agency has determined that the applicant's product and its proposed use are identical or substantially similar to a currently registered pesticide and use, or that the pesticide and its proposed use differ only in ways that would not significantly increase the risk of unreasonable adverse effects on the environment.

(c) Notwithstanding the provisions of paragraph (a) of this section, the Agency will not approve the conditional

registration of any pesticide product for a new use under FIFRA sec. 3(c)(7)(B) if:

(1) The pesticide is the subject of a special review, based on the use of the product that results in human dietary exposure; and

(2) The proposed new use involves use on a major food or feed crop, or involves use on a minor food or feed crop for which there is available an effective alternative registered pesticide which does not meet the risk criteria associated with human dietary exposure. The determination of available and effective alternatives shall be made with the concurrence of the Secretary of Agriculture.

(6)

Supreme Court, U.S.
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No. 04-81

In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

As the United States has stated in another case pending before this Court, "FIFRA preempts state-law causes of action * * * that would require a registrant who has received EPA approval of its label under FIFRA to change that label to avoid future liability." *Bates* v. *Dow Agrosciences LLC*, Br. for the United States as Amicus Curiae, 2004 WL 1205202, at **14-15 (May 28, 2004) (No. 03-388). It is undisputed that if BASF had labeled Poast Plus differently – either by treating it as identical to Poast or by labeling it for use on minor crops – it would have faced no state-law liability under respondents' theory. It also is undisputed that BASF's current labeling of Poast Plus was approved by EPA and complied fully with FIFRA's requirements. Because respondents cannot obscure these fundamental points, there can be no doubt that their consumer fraud action is preempted.

Nevertheless, the Minnesota Supreme Court has ruled that jurors presented with consumer fraud claims may second-guess EPA's pesticide labeling regulations and impose treble damages for labeling that they consider "unconscionable." See Opp. 3. The Minnesota courts also have created an exception to the First Amendment for consumer fraud claims even when those claims challenge truthful speech on issues of public importance. Because the brief in opposition both verifies BASF's characterization of the case and acknowledges the sweeping nature of the decisions below, it confirms that this matter merits review by this Court.

I. RESPONDENTS CONCEDE THAT THEIR LAWSUIT ATTACKED BASF'S PESTICIDE LABELS AND ITS PROTECTED SPEECH

Respondents devote much of their brief to a distorted rendition of the facts that is meant to portray BASF as an unscrupulous corporation. See Opp. 1-20. Stripped of unsup-

ported accusations and distracting rhetoric, however, the brief in opposition confirms in all essential respects the petition's description of this case. The parties agree that (1) respondents' action was an attack on BASF's FIFRA-compliant labeling of its pesticides; and (2) their claims relied heavily on allegations that BASF's protected speech violated state law.

First, respondents concede that their case turns entirely on the premise that "Poast and Poast Plus are the same herbicide" (Opp. 9), fraudulently labeled as different products. Respondents' assertion that the two pesticides are "the same" self-evidently rests on nothing more than the undisputed facts – explained fully in the petition – that (1) the two pesticides had the same *active* ingredient, and (2), at BASF's request, EPA registered the two pesticides for the same crops using the same residue testing data. But respondents do not deny that Poast Plus contained a newly-invented, patented additive, not present in Poast, which made the sethoxydim in the product more biologically active ("hotter") and therefore made Poast Plus more dangerous for minor crops than Poast. Tr. 2736-2743, 2921. Respondents also do not deny that, because of the two pesticides' different formulations, EPA's regulations *required* BASF to label Poast and Poast Plus as two distinct products. See Pet. 4.

Respondents' claim that BASF engaged in "price-gouging" (Opp. 19) also directly challenges the differential labeling mandated by FIFRA. Respondents testified uniformly that Poast was an excellent product that *increased* their profits by increasing crop yields. Tr. 593, 1301, 2200. Nonetheless, they argue that BASF "exploited" them by failing to label and market Poast Plus – which for a time was priced competitively to capture a share of the soybean market – as if Poast Plus were identical to Poast. See Opp. 2 ("BASF engaged in a national 'system of deceit' * * * by marketing *the same herbicide as different products* * * * to extract in-

flated prices from minor crop farmers.") (emphasis added); see also *id.* at 10-11.

But the two pesticides are *not* "the same" (Opp. 9): as its name suggests, Poast *Plus* contains an additional ingredient that was extensively tested for use on soybeans but not minor crops. BASF was complying with FIFRA – as well as sensible industry practice – in giving its two products distinct names and labels. And BASF did nothing wrong in "exploiting" the market potential of Poast – a fully tested pesticide with a long record of excellent results in the underserved minor crop market.

Second, respondents acknowledge that the *other* facet of the so-called "fraudulent marketing scheme[]" (Opp. 3) was BASF's decision to omit minor crops from the Poast Plus labels and to market the product consistently with those labels. See, *e.g.*, Opp. 12 (discussing "BASF's concealment and lies regarding the EPA's registration of Poast Plus for minor crops"). But they concede (Opp. 21) that EPA's subset-labeling rule (40 C.F.R. § 152.130(b)) *expressly authorized* the omission of certain EPA-registered uses from the product labeling. And they simply ignore the crucial fact that *no State ever registered Poast Plus for use on minor crops.*

Thus, respondents cannot deny that it would have been *illegal* for BASF to label or advertise Poast Plus for minor crops, and that it would have been *illegal* for any farmer (except for farmers in North or South Dakota during the one-year special local needs registration period) to use Poast Plus on minor crops. See Pet. App. 74a. The fact that no State ever registered Poast Plus for minor crops also means that BASF's allegedly deceptive promotional statements (*e.g.*, that Poast was the "only postemergence herbicide registered for use in flax" (Opp. 12)) were entirely *true*.

Although they otherwise turn a blind eye to the parallel role that the States play in the registration of pesticides, respondents assert repeatedly that BASF deceived state regula-

tors regarding the breadth of the EPA registration of Poast Plus. See, *e.g.*, Opp. 15-18. These allegations, which concern a short-lived misunderstanding between BASF and North Dakota officials in 1994, have no relevance here. A BASF employee informed North Dakota's new Commissioner of Agriculture, Sarah Vogel, that the company would have to conduct substantial additional testing in order to label Poast Plus for minor crops. Tr. 1745, 1809-1811. Although there is confusion in the record about what kind of testing the BASF employee said was needed (see P. Ex. 73), the statement was true: although *residue* testing had been completed, BASF believed that more target-area phytotoxicity and tank-mix testing would be needed before it could market Poast Plus for minor crops. Tr. 2920-2923, 2946. Vogel nonetheless believed that BASF had not been candid when she learned from EPA a few weeks later that Poast Plus had already been federally registered for minor crops. Tr. 1752.[1]

This misunderstanding had no impact at all on respondents, who knew nothing of the communications and did not purchase Poast Plus in North Dakota for use there. More importantly, Vogel soon learned that EPA fully supported the right of product registrants to omit registered uses from their labels – specifically including BASF's right to omit minor crops from the Poast Plus label. Over Vogel's objections, EPA required her to enforce FIFRA's prohibition against the off-label use of Poast Plus on sugar beets, despite the fact

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[1] It is in *this* context that EPA informed North Dakota officials that the exclusion of sugar beets from the Poast Plus labeling "related to a marketing strategy and is not a regulatory matter." Opp. 17 (quoting P. Ex. 334). That comment meant only that EPA regulations were not *preventing* BASF from labeling Poast Plus for minor crops. The fact remains that an EPA regulation expressly *permitted* BASF to omit minor crops from the Poast Plus label – as EPA made clear to Vogel. See D. Ex. 559 ("If a company chooses to not support crops on its label, that's its choice").

that EPA had registered Poast Plus for sugar beets. D. Ex. 636. As Vogel stated, she was told by EPA that, regardless of any difference in price, "[w]e have no choice but to enforce the law." Tr. 1803 (quoting D. Ex. 559). Respondents, however, have now managed to obtain from the Minnesota courts what Commissioner Vogel could not obtain from EPA: a ruling that farmers were entitled to use Poast Plus for all of its registered uses, despite the federally-approved labeling limiting farmers to a subset of such uses.

Finally, respondents confirm that their case relied heavily on characterizing BASF's protected speech activities as unconscionable business practices. See Opp. 14 ("BASF urged that farmers be criminally prosecuted for 'off-label' use of cheaper Poast Plus on minor crops"); *id.* at 15 ("BASF used its public relations firm to ghostwrite an Article disseminated nationally, warning of the risks of 'off-label' use while concealing the fact that the article was paid for by BASF"). Respondents impugn BASF's motives, but they cannot deny that the magazine article's description of the regulatory regime was entirely accurate. Nor do they deny that BASF's communications with regulatory officials regarding the possible off-label use of Poast Plus resulted in successful prosecutions of farmers and dealers that continued, at EPA's insistence, long after state officials were fully aware of the scope of the EPA registration for that pesticide.

II. RESPONDENTS' NARROW UNDERSTANDING OF FIFRA'S PREEMPTIVE EFFECT IS WRONG

Respondents contend that FIFRA's express prohibition of state labeling requirements does not apply to state-law consumer fraud claims. See Opp. 21. Such a broad exception to federal preemption is indeed a necessary consequence of the decision below. If the decision stands, then consumer class actions brought in Minnesota henceforth will assume a conclusive role in determining the content of pesticide labeling. Contrary to respondents' arguments, however, the decision is

flatly at odds with the construction of FIFRA's express preemption provision that has been adopted by other courts.

Respondents acknowledge (Opp. 24-26) the large body of case law holding that FIFRA expressly preempts *any* damages action – including consumer fraud actions – arising from an alleged omission or misstatement on a pesticide label. They attempt to distinguish these rulings (*id.*) on the ground that they concern different *subject matter* (failure-to-warn, phytotoxicity, and fraud on the EPA). But they offer no textual or other reason why FIFRA would preempt, for example, a claim that a pesticide's label failed sufficiently to warn of risks to crops – an issue that the Court will address this Term in *Bates* v. *Dow Agrosociences LLC*, No. 03-388 – but would not preempt a claim that it was unconscionable for a manufacture to omit certain crops from the list of approved uses on a pesticide's label. If anything, respondents' claims strike more directly at the heart of EPA's labeling regime, because an EPA regulation *expressly allows* the omission of which respondents complain.

Respondents contend (Opp. 22) that EPA "does *not* address company marketing * * * practices." They support that assertion only with Commissioner Vogel's statement conveying an EPA official's remark that the omission of minor crops from the Poast Plus label was "related to a marketing strategy and is not a regulatory matter." P. Ex. 334. As explained above (at note 1), this meant only that EPA already had authorized BASF to add minor crops to the Poast Plus label – a fact that is not in dispute.

It is also undisputed, however, that EPA's subset labeling rule gave BASF the option of *excluding* minor crops from the labeling. See Opp. 21. EPA promulgated that rule to ensure that EPA's registration of a pesticide for a particular use did not create an obligation to market the pesticide for that use. See CropLife America Am. Br., at 9-11. Indeed, EPA insisted that North Dakota regulators respect the labeling flexi-

bility that FIFRA afforded to BASF and prosecute off-label use of Poast Plus by minor-crop farmers despite its knowledge that BASF was charging less for the pesticide with the more restrictive label. See D. Ex. 636; Tr. 1803-1805. Because federal law gave BASF the option of excluding minor crops from the Poast Plus label, respondents' claim that this labeling decision entitled them to treble damages is preempted – both expressly by Section 136v(b) of FIFRA and under principles of conflict preemption. See *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 881-882 (2000).

Respondents also contend that "FIFRA does not grant the EPA authority over advertising of pesticides." Opp. 21. The Federal Register notice that respondents cite for that proposition says just the opposite. In that publication, EPA promulgated its regulation prohibiting advertisement of unregistered pesticides or uses (40 C.F.R. § 168.22) and stated that its authority under FIFRA extends to all "claims in advertising that are made 'to induce the * * * sale and use' of a pesticide and that therefore are part of the distribution or sale of the pesticide." 54 Fed. Reg. 1122, 1124 (1989).

Although EPA's authority over pesticide *advertising* is not "plenary" (*id.*), its authority over pesticide *labeling* is made exclusive by 7 U.S.C. § 136v(b). Appellate courts thus generally agree that FIFRA preempts state-law challenges to advertisements that "are premised ultimately upon the inadequacy of product label[ing]." *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995); see also, *e.g.*, *Kuiper* v. *Am. Cyanamid Co.*, 131 F.3d 656, 663 (7th Cir. 1997); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993); Product Liability Advisory Council Am. Br. at 8-10. Here, all of the alleged flaws in BASF's advertisements were rooted in the asserted defects in BASF's labeling. The advertisements (like the labeling) distinguished between Poast and Poast Plus, and the advertisements (like the labeling) indicated to farmers that they could not lawfully use Poast Plus on minor crops.

BASF could not have addressed respondents' concerns about the advertisements without also changing its labeling.[2]

"[T]he plain terms of Section 136(v)(b) * * * prohibit a State from imposing '*any* requirements' that are 'in addition to or different from' the FIFRA requirements." *Bates*, Br. for the United States as Amicus Curiae, 2004 WL 1205202, at *13 (emphasis added). The Minnesota Supreme Court's ruling, however, superimposes 50 states' consumer fraud laws on FIFRA's labeling regime. This case plainly merits review alongside *Bates*, with expedited briefing if necessary to allow coordinated argument.

III. THE FIRST AMENDMENT RULING MERITS REVIEW

Respondents' over-caffeinated rhetoric cannot obscure the significant First Amendment implications of the decision below. As BASF showed in the petition (at 23-24), respondents acknowledged before the jury that the statements in *Sugarbeet Grower* magazine upon which they premised liability presented "good information." BASF's reports to state authorities regarding possible off-label use of Poast Plus likewise were entirely accurate; it is undisputed that North Dakota authorities continued successful enforcement actions in response to those reports even after learning that the EPA had registered Poast Plus for use on minor crops.[3] Respon-

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[2] Respondents rely on the testimony of lay witnesses who agreed with respondents' counsel that a company can comply with FIFRA and "still commit consumer fraud." Opp. 23-24. Such improperly broad questions and their ambiguous answers may have had an impact on the jury, but they shed no light on whether FIFRA preempts a state consumer fraud action claiming that labeling practices sanctioned by federal law nonetheless are unconscionable under state law.

[3] Respondents quote Vogel's testimony that BASF turned in farmers "for doing things that were in fact legal and that the company knew all along was legal." Opp. 28. That inaccurate testimony re-

dents offer no response to these points. In addition, as BASF also showed in the petition (at 24-27), the Minnesota court's *actual holding* was that the First Amendment does not shield the truthful statements at issue here because this case does not raise issues of defamation, libel, or prior restraint. Respondents make no effort to defend this ruling or to respond to our argument that the ruling constitutes a shocking departure from this Court's precedents.

Instead, respondents insist, in highly conclusory terms, that BASF's statements receive no constitutional protection because this case is one alleging "consumer fraud." Opp. 26-27. The statements on which the courts below premised liability, however, were truthful ones concerning subjects that respondents themselves acknowledged to be "significant matters of public concern." Pet. 23. As BASF showed in the petition (at 24-27), such statements cannot be stripped of First Amendment protection "[s]imply [by] labeling an action one for 'fraud.'" *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 617 (2003). Again, respondents make no response to this point.

The holding below inevitably will chill truthful, socially valuable speech in ways that concerned a majority of the Court in *Nike, Inc.* v. *Kasky*, 539 U.S. 654 (2003). See U.S. Chamber of Commerce Am. Br., at 18-20. In arguing to the

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flects nothing more than Vogel's admitted objections to the federal scheme, which permitted manufacturers to obtain broad "shelf registrations" from EPA but to include fewer crops on the product label. Tr. 1795-1797. As Vogel acknowledged, she became fully aware that the use of Poast Plus on minor crops was unlawful when EPA refused North Dakota's request for an enforcement waiver. Tr. 1806. As she explained at trial, "That's why we did the 24(c)" special local needs registration, which for one year only made it lawful for North Dakota farmers to use Poast Plus for minor crops if they signed an assumption of risk liability waiver. Tr. 1791.

contrary, respondents observe only that the suit in *Nike* was brought by an "ideological plaintiff" who had suffered no direct harm, while the interest of respondents here is purely mercenary. Opp. 29. But respondents do *not* deny that the state consumer fraud statute at issue here (as well as many similar statutes in other states) shares the most troubling characteristics of the California law applied in *Nike*: as we showed in the petition (at 27-28), state law allows a jury to punish speech whenever it finds that the challenged statement was "unconscionable" because inconsistent with a "broad business ethic," even when – as is true in this case – there was no showing that the plaintiff relied on (or was aware of) the statement, and even when there was no showing of any intent to deceive on the part of the speaker.

Given the broad reach of the holding below – which one Minnesota appellate judge called "the poster child for national class action reform" (Pet. App. 56a) – it is impossible for a commercial speaker anywhere in the country to have confidence that its *truthful* statements will not give rise to potentially enormous liability. For example, so long as a given jury has an especially severe view of proper "business ethics," an organic farmer could be found liable to growers of conventional agricultural products for opining on the hazards of pesticides; or a candy maker could be called to account by a cigarette company for outlining the health advantages of chewing gum rather than smoking tobacco; or a maker of electric cars could be haled into court for criticizing internal combustion engines. Because such claims would be no more far-fetched than the ones advanced in this case, it is inevitable that the holding below will discourage speech in ways that are deeply troubling and wholly inconsistent with the First Amendment. Review by this Court accordingly is imperative.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE
Supreme Court of the United States

BASF CORP.

Petitioner,

v.

RONALD PETERSON, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") respectfully requests leave to file the attached brief *amicus curiae* pursuant to Court Rule 37.2. Petitioner has consented to the filing of this brief, but respondents have withheld consent.

The Chamber is the world's largest federation of business organizations and individuals. It represents an underlying membership of more than three million businesses of every size, in every business sector, and from every geographic region of the country. One of its primary missions is to represent the interests of its members by filing *amicus* briefs in cases involving issues of national concern to American business.

The Chamber and its members have a strong interest in this case because the Minnesota courts significantly curtailed freedom of speech by holding that a corporate defendant can be held liable for "consumer fraud," *notwithstanding the truthfulness of its "commercial speech."* This holding is so extreme that it turns *every* corporate utterance into a potential predicate for treble damages, insofar as a jury might find the company's *truthful* speech to be "unconscionable" under an admittedly "amorphous" state consumer protection statute. *See* Pet. App. 20a.

A substantial amount of speech is at jeopardy. If BASF's speech in this case (including a truthful and non-misleading submission to a reputable trade publication and truthful information submitted to a government agency) can be used to support liability under state consumer protection laws, then a great deal of accurate corporate speech will be fair game for "consumer fraud" actions when alleged to be "for the wrong purpose." Pet. 7. For example:

> fast-food companies often encourage children to exercise and stay in school;

energy companies support conservation and efforts to develop alternative fuel sources;

alcoholic beverage manufacturers encourage consumers to drink responsibly;

athletic apparel companies trumpet financial contributions to after-school programs; and

television stations run advertisements that encourage students to read.

Conduct that was once lauded as "good corporate citizenship" could be considered *prima facie* "fraudulent," on the theory that consumers would not heed the corporate speaker's message if they understood that the speech was motivated (at least partially) by profit.

This case represents a particularly egregious example of state consumer protection litigation run amok. Applying a New Jersey statute to BASF's nationwide conduct, the Minnesota courts have punished truthful, non-misleading speech on the basis that it furthered (in the jury's view) an unfair commercial practice. Because speech by corporations is increasingly disseminated nationwide and even worldwide, the decision below would threaten speech around the globe. In light of the Chamber's strong interest in defending its members against this assault on their freedom of speech, the Chamber seeks leave to file this brief as *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The interest of the *amicus curiae* is described in the foregoing Motion for Leave to File.[1]

SUMMARY OF ARGUMENT

For years, the Court has sent conflicting signals on the proper definition of "commercial speech." The resulting jurisprudential uncertainty has led the lower courts to take widely diverging approaches in determining when corporate speech is subject to reduced protection under the First Amendment. In this case, the decision below deepens that conflict by treating a breathtakingly broad class of speech as "commercial," thereby deeply menacing our system of free expression. According to Minnesota's courts, commercial speech includes all statements of fact: (i) made by persons engaged in commerce (including all businesses and their public relations firms); (ii) made to an audience including actual or potential purchasers of their products (including readers of a trade journal); and (iii) addressing any matter in which the speaker has some form of commercial interest (including truthful discussion of the illegal, off-label use of pesticides).

Whatever the correct test may be, this surely is not it. From its inception, the "commercial speech" doctrine was designed to *broaden* the First Amendment's reach by granting limited constitutional protection to product advertisements previously held unprotected. But now, the Minnesota courts have treated speech as "commercial" to *restrict* freedom of speech by subjecting speech at the First Amendment's core – including *undeniably true* speech – to the reduced level of protection accorded to "commercial" speech. This makes no sense; at a barebones minimum, such

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1. Pursuant to S. Ct. R. 37.6, the undersigned counsel for the *amicus curiae* states that they alone authored this brief, and no other persons or entities made any monetary contribution to its preparation or submission.

speech must address the attributes of the company's products or services, as opposed to general discussion on topics of public concern in trade journals or reports to government agencies. Otherwise, speech that lies at the core of the First Amendment will be relegated to its periphery.

The Court should also grant *certiorari* to confirm that even if this kind of speech is to be classed as "commercial speech," that label, without more, is not dispositive of the applicable level of constitutional protection. The Court has sent conflicting signals on that issue, and this case presents an excellent vehicle for the Court to address the increasing uncertainty by holding that the "commercial speech" label is not a license for using *truthful* speech as the foundation for a "consumer fraud" action. *See Peterson II*, Pet. App. 49a-50a (holding truthfulness is an affirmative defense to libel charges but *not* to consumer fraud charges).[2]

These are precisely the kinds of issues that the Court sought to resolve in *Nike, Inc. v. Kasky*, 539 U.S. 654, 123 S. Ct. 2554 (2003), before it ultimately dismissed the case as improvidently granted. *See id.* The issues remain just as urgent in the wake of that result, and this case presents a clean vehicle for the Court to address them definitively.

The Court's guidance on these crucial questions is urgent for the entire business community. As matters stand, the lower courts' uncertainty regarding the definition and treatment of commercial speech is chilling speech on important public policy matters that should be encouraged, not discouraged. The *Kasky* case itself illustrates pressing problems that require the Court's immediate intervention. Moreover, the increasingly nationwide and international

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2. The Minnesota Supreme Court refused to review the Court of Appeals' holding that the First Amendment was inapplicable to BASF's speech, making the intermediate appellate court's decision in *Peterson II* the final state court ruling on the issue. The Court of Appeals' decision in *Peterson II* is reprinted at Pet. App. 28a-56a.

scope of corporate speech and consumer class actions means that many corporate speakers are effectively bound by the stultifying laws of the least-protective jurisdiction. The Court's clarifying guidance is needed now.

ARGUMENT

I. THE COURT'S GUIDANCE IS NEEDED ON THE DEFINITION OF COMMERCIAL SPEECH.

This case presents an excellent opportunity to address the confusion and division generated by this Court's past pronouncements on the definition of "commercial speech."

A. The Court's Precedents Have Generated Substantial Uncertainty Regarding the Definition of "Commercial Speech."

The Court has announced at least three different tests for determining whether speech is "commercial." The Court has "usually defined" commercial speech as "speech that does *no more* than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (emphasis added). At times, however, the Court has announced a more expansive test: that "expression related solely to the economic interests of the speaker and its audience" is commercial. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). The Court employed yet a third test in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), by considering three factors: whether the communication was an advertisement; whether it referred to a specific product or service; and whether the speaker had an economic motivation for the speech. *See id.* at 66-68. The *Bolger* Court added to the indeterminacy of these precedents by indicating that speech is not necessarily commercial even if all three factors are met, and conversely that speech can be commercial even if all three factors are not met. *See id.* at 66-67 & n.14.

This Court has acknowledged the inconsistency and indeterminacy of these and other precedents:

> [W]e have stated that speech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression. We have also suggested that such lesser protection was appropriate for a somewhat larger category of commercial speech – "that is, expression related solely to the economic interests of the speaker and its audience." We did not, however, use that definition in either *Bolger* or in [*Board of Trustees v. Fox*, 492 U.S. 469 (1989)] .... In *Fox*, we described the category even more narrowly, by characterizing the proposal of a commercial transaction as "*the test* for identifying commercial speech."

City of Cincinnati v. Discovery Network, 507 U.S. 410, 422-23 (1993) (emphasis original; citations omitted). The Court chose not to resolve this inconsistency, however, because the parties agreed that the speech at issue in that case was commercial. *See id.* at 416.

The ambiguity left in the wake of *Discovery Network* has been exacerbated by subsequent commercial speech cases. For example, the Court accepted as "commercial speech" statements on an attorney's letterhead and business cards identifying the attorney as a certified public accountant and certified financial planner, *see Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 142 (1994), a statement of alcohol content on the label of a beer bottle, *see Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-482 (1995), and truthful statements about the retail prices of liquor, *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). None of these statements fits

comfortably within the definition of "commercial speech" established in *United Foods*, *Central Hudson*, or *Bolger*.

Lower courts and commentators have expressed frustration with this continuing uncertainty, which the Court tried but failed to resolve in *Kasky*. The Second Circuit, for example, has lamented the "doctrinal uncertainties left in the wake of Supreme Court decisions from which the modern commercial speech doctrine has evolved." *Bad Frog Brewery, Inc., v. New York State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998). Commentators agree that this Court's "attempts to define 'commercial speech'" are "more *ad hoc* than the source of any real guidance." Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. Rev. 807, 831-32 (1999); *see also* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 896 (2d ed. 1988); Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 5 (2000) (noting the "boundaries" of commercial speech are "quite blurred").

B. The Lower Appellate Courts Are in Conflict on the Definition of "Commercial Speech."

The indeterminacy of the Court's precedents has inevitably led to a conflict among various federal courts of appeals and state courts of last resort. The Seventh Circuit has concluded that while "[i]t is not for us to proclaim the official demise of the *Central Hudson* test" for commercial speech, "we will not rush to endow that standard with a greater scope than the traditional definition" of "speech which does *no more than propose a commercial transaction*." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684-85 (7th Cir. 1998) (emphasis added). In doing so, the Seventh Circuit, speaking through now-Chief Judge Flaum, expressed concern about "the incredible breadth of the *Central Hudson* test if taken to its literal extremes." *Id.* at 684.

The Ninth Circuit has imposed an especially stringent variant of the *Virginia Pharmacy* test. After determining that this Court's *Discovery Network* decision "cast serious doubt upon [*Bolger*]," the Ninth Circuit concluded that it should limit commercial speech to traditional advertising. *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 710 (9th Cir. 1999). As the court explained its approach, "[t]his simply is not a case of 'I will sell you X at the Y price.' Under *Discovery Network*, that observation alone suffices to classify the expression as non-commercial." *Id.* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 758, 762 (1976). Although the Ninth Circuit later granted *en banc* review in *Thomas*, the 11-member *en banc* court dismissed the case on ripeness grounds without reaching or commenting on the commercial speech issue. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (*en banc*). Thus, Judge O'Scannlain's panel opinion on that issue remains "persuasive authority" in the Ninth Circuit. *See Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489 (1999).

Perhaps for that reason, at least two subsequent panels of the Ninth Circuit have held speech to be noncommercial under similarly restrictive tests. In *Hoffman v. Capital Cities/ABC, Inc.*, 225 F.3d 1180 (9th Cir. 2001), the court held that the speech at issue was not commercial because it did not appear "*in a traditional advertisement printed merely for the purpose of selling a particular product.*" *Id.* at 1185 (emphasis added). The court further explained that "[t]here are commonsense differences between speech that does no more than propose a commercial transaction and other varieties, and common sense tells us that this is not a simple advertisement." *Id.* at 1185-86 (internal quote and citation omitted). *See also Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) ("If speech is not 'purely commercial' – that is, if it does more than propose a

commercial transaction – then it is entitled to full First Amendment protection.").

The Tenth Circuit has also held that "commercial speech is best understood as speech that merely advertises a product or service for business purposes." *Cardtoons, L.C. v. Major League Baseball Players' Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996). Because the speech at issue in *Cardtoons* did not "merely advertise[] a product or service," the Tenth Circuit held that it was not "commercial speech." *Id.*

In contrast to these circuits that have followed variants of the *Virginia Pharmacy* test, other circuits have followed an expansive version of the *Bolger* test. *See, e.g., Procter & Gamble Co. v. Amway*, 242 F.3d 539 (5th Cir. 2001); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109 (8th Cir. 1999). In *Procter & Gamble*, one company made statements about a competitor's business operations – specifically, about whether the competitor donated its profits to the Church of Satan – and suggested that consumers boycott the competitor's products for that reason. Under *Bolger*, the Fifth Circuit concluded that this was "commercial speech" if the speaker "acted *substantially* out of economic motivation." 242 F.3d at 552-53 (emphasis in original). The court of appeals reasoned that the second *Bolger* factor was satisfied by references to the competitor's products, and "[t]he first factor – whether the speech is an advertisement – seems to collapse into the third factor," which is the speaker's motivation. *Id.* The Fifth Circuit thereby held that even boycott-related speech, as opposed to traditional product advertising, can be considered commercial speech.

In contrast to the variants of the *Virginia Pharmacy* test applied by the Seventh, Ninth, and Tenth Circuits, and in contrast to the expansive *Bolger* test fashioned by the Fifth Circuit, the Minnesota courts added to the general confusion by ignoring the need for multi-part tests altogether. According to the courts below, every speech-act made by or

on behalf of a company enjoys reduced constitutional protection, at least to the extent that it fails to disclose its profit margins. *See Peterson I*, Pet. App. 62a (plaintiff may claim damages for "consumer fraud" even based on truthful speech if he "lost the opportunity to refuse to buy [the defendant's products] because [he was ignorant] of the large profit [the defendant] would make" on the transaction).

The resulting instability is especially manifest in this case, because the speech that BASF sought to exclude under the First Amendment is not "commercial" under the tests applied by other courts. Clearly BASF's magazine article did not merely "propose a commercial transaction." *Commodity Trend Serv.*, 149 F.3d at 684-85. Indeed, it said nothing resembling "'I will sell you X at the Y price.'" *Thomas*, 165 F.3d at 710. Nor did it constitute "a traditional advertisement." *Hoffman*, 225 F.3d at 1185. It certainly did not "merely advertis[e] a product or service." *Cardtoons*, 95 F.3d at 970. Instead, BASF's public relations firm made general and truthful statements about illegal off-label pesticide use, without mentioning BASF or its products, and without offering any prices or terms of sale. *See* Pet. 6-7.

By holding such speech to be commercial, the Minnesota courts ruled in conflict with the federal circuits that follow variants of the *Virginia Pharmacy* test. Their decision reaches even farther than the Fifth Circuit's application of the *Bolger* test, inasmuch as BASF's article made no mention of its products. Indeed, the lower court's decision in this case reaches even farther than the California Supreme Court's troublesome decision in *Kasky*, which held that speech may be deemed "commercial" solely because of the speaker's economic motivations. *See* 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 123 S. Ct. 2554 (2003). This jurisprudential misunderstanding has persisted long enough; the Court should take this opportunity to forestall further confusion about the proper scope of constitutional protection for speech on such matters of public concern.

C. The Court Should Address the Speech Issues and Hold that, At a Minimum, Only Speech About the Attributes of Goods or Services for Sale Can Be Considered "Commercial."

This case presents an especially valuable vehicle for addressing the lower courts' confusion about the definition of "commercial speech." While line-drawing in this area may be difficult in some respects, this case turns on an obvious line: only speech advertising the attributes of products or services for sale can be considered "commercial" speech. In contrast, speech that addresses business operations in general, or other matters of public policy or public concern, should be accorded the full First Amendment protections enjoyed by all other participants in those debates.

1. The History of the "Commercial Speech" Doctrine Demonstrates that It Addresses Only the Advertising of Products and Services, Not Corporate Speech Generally.

This line is strongly supported by the history of the "commercial speech" doctrine, which shows that the doctrine was intended to *grant* limited protection to product advertising, not to *limit* the protections already applied to other types of corporate speech. The Court developed the modern "commercial speech" doctrine in the 1970s in response to its earlier holding that "the Constitution imposes *no . . . restraint* on government as respects *purely commercial advertising*." *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (emphasis added). Specifically, the Court gave birth to the doctrine by overruling *Valentine* and holding that "commercial speech, like other varieties, is protected." *Virginia Pharmacy*, 425 U.S. at 760-61.

In doing so, the Court could not have been clearer that by "commercial speech," it was referring only to the narrow kind of product advertisement addressed in *Valentine*:

> [T]he question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. *The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.*

Id. at 760-61 (emphasis added). From its genesis, therefore, the "commercial speech" doctrine was designed to address speech that does *not* "editorialize on any subject," "report any particularly newsworthy fact," or "make generalized observations . . . about commercial matters." *Id.* Instead, it was designed to give limited *protection* to speech that does "*no more* than propose a commercial transaction." *Id.* at 761, 762 (internal quotation omitted).

Significantly, the speech at issue here – on public policy matters involving corporations – was fully protected long before the Court extended any protection to "commercial" speech. As early as 1940, the Court held that self-interested speech "concerning the conditions in industry and the causes of labor disputes" is protected by the First Amendment, because it is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940); *see also Thomas v. Collins*, 323 U.S. 516 (1945). Thus, speech about business operations generally – as opposed to product advertising – has always received full First Amendment protection, not the limited protection subsequently devised for "commercial speech."

The Court has never departed from this understanding. To the contrary, the Court has repeatedly recognized that the advertisement of products or services – as opposed to business operations generally – is the *sine quo non* of "commercial speech." Thus, the Court explained in the early years of the "commercial speech" doctrine that such speech "serves to inform the public of the availability, nature, and prices of products and services," *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977), because it "relates to a particular product or service." *Friedman v. Rogers*, 440 U.S. 1, 10 (1979); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981) (referring to "commercial speech" as "commercial price and product advertising"). More recently, the Court confirmed: "The entire commercial speech doctrine . . . represents an accommodation between the right to speak and hear expression about *goods and services* and the right of government to regulate the sales of such *goods and services*." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality opinion) (quotation omitted) (emphasis added and omitted).

In keeping with this long-established understanding of the "commercial speech" doctrine, this Court (unlike the Minnesota state courts) has "always been careful to distinguish commercial speech from speech at the First Amendment's core." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). For example, the Court has held that while a manufacturer's speech about the attributes of a specific product is "commercial" regardless of whether it is linked to a public debate, *see Bolger*, 463 U.S. at 67-68, an energy company's speech to its customers about energy conservation is not "commercial." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8-9 (1986) (plurality opinion). Such speech "extends well beyond speech that proposes a business transaction and includes the kind of discussion of matters of public concern that the First

Amendment both fully protects and implicitly encourages." *Id.* (internal citations and quotations omitted).

2. BASF's Speech Is Fully Protected.

Far from advertising its products' attributes, BASF's magazine article in *Sugarbeet Grower* presented truthful discussion about regulatory matters of great importance to its audience – the illegal, off-label use of pesticides on "minor" crops – as did the reports it submitted to government authorities. This is speech at the core of the First Amendment, not the type of "commercial speech" that was excluded altogether from First Amendment protection prior to *Virginia Pharmacy*. *See, e.g., Thornhill*, 310 U.S. at 103.

Indeed, corporations are generally accorded the same free speech rights as other speakers precisely because the First Amendment is designed to protect the public's access to information, and "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). Suppressing speech merely because the speaker is a corporation runs contrary to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

This should be an easy case. Instead of making statements connected with the sale of Poast Plus, the article addressed the changing regulatory environment for off-label pesticide use as part of a general debate on matters of public concern. Similarly, the reports simply brought unlawful conduct to the agency's attention. Accordingly, BASF's speech falls well outside the "commercial speech" category.

II. THE COURT'S GUIDANCE IS NEEDED ON THE TREATMENT OF COMMERCIAL SPEECH.

Even if the Court considered BASF's speech to be "commercial," that should not be the end of the matter. The

Court has sent conflicting signals on whether the "commercial speech" label alone dictates the applicable level of constitutional protection, or whether further analysis is required. The Court should take this opportunity to confirm that this label does not invariably trump all other strands of First Amendment jurisprudence, especially the fundamental prohibition against discrimination among speakers.

A. The Court Has Sent Conflicting Signals on the Treatment of "Commercial Speech."

In Section I.A, above, the Chamber addressed the conflicting signals that the Court has sent on the definition of "commercial speech." The Court has also "followed an uncertain course" in determining what level of protection to accord speech that has been determined to be "commercial." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (2001) (Thomas, J., concurring). In some cases, the Court has held that the "mere fact" that speech is commercial "does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress" it. *44 Liquormart*, 517 U.S. at 501; *see also, e.g., Discovery Network*, 507 U.S. at 424 (emphasizing that courts must be careful not to "place too much importance on the distinction between commercial and noncommercial speech"). But in other cases (and especially in older cases), the Court has held the "commercial speech" label dispositive of the level of protection accorded the speech. *See, e.g., Central Hudson*, 447 U.S. at 561-66.

The Court's most recent precedents have only added to the uncertainty. In *United Foods*, this Court noted that precedents which "accord less protection to commercial speech than to other expression" have "been subject to some criticism." 533 U.S. at 409-10 (citing opinions of Stevens and Thomas, JJ.). But the Court concluded that it "need not enter into the controversy" because the restriction at issue in that case could not be upheld under any standard. *Id.* at 410. In *Lorillard*, the Court recognized that a *majority* of the

Justices have criticized *Central Hudson*, but again concluded that the traditional test sufficed for purposes of that case. *See* 533 U.S. at 554-55; *see also id.* at 571 (Kennedy, J., joined by Scalia, J., concurring) (emphasizing that in view of the "obvious overbreadth" of the restriction at issue, the Court was not required *in that case* "to consider whether *Central Hudson* should be retained in light of the substantial objections that can be made to it"); *id.* at 575 (Thomas, J., concurring) ("there is no philosophical or historical basis for asserting that commercial speech is of lower value than noncommercial speech") (internal quotation omitted).

Similarly, in *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), the Court again noted that "several Members of the Court have expressed doubts about the *Central Hudson* analysis." *Id.* at 367-68. But the Court again declined "to break new ground," in part because "[n]either party . . . challenged the appropriateness of applying the *Central Hudson* framework" in that case. *Id.* at 367. And most recently, in *Nike, Inc. v. Kasky*, the Court declined on procedural grounds to reconsider the "potentially conflicting principles" underlying *Central Hudson*, notwithstanding three Justices' efforts to revisit these issues. *Id.*, 123 S. Ct. at 2565 (Breyer and O'Connor, JJ., dissenting); *see also id.* at 2559 (Kennedy, J., dissenting).

This state of affairs has led to unfortunate results. In *Procter & Gamble*, the Fifth Circuit held that a corporation's speech about a competitor's religious affiliation could be deemed false "commercial speech" entitled to *no* First Amendment protection, even though this speech "touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." 242 F.2d at 550. Judge Smith, the author of the court's opinion, went out of his way to emphasize that he questioned this result. *See id.* at 557-59. But he determined that his hands were tied by this Court's controlling precedents. *See id.* at 557-58.

Judge Smith's efforts to grapple with the contours of this Court's jurisprudence are admirable in contrast with the cursory – and astoundingly fallacious – approach adopted by the Minnesota courts below. Instead of considering the complexities of these precedents, the court in *Peterson II* concluded that the First Amendment provides *absolutely no* protection for a company's speech in a "consumer fraud" case, even on an issue of acknowledged public concern. The reasoning for this conclusion was no more than tautological definition: the First Amendment does not apply, the court said, simply because "this is a consumer fraud action, not a defamation action." *Peterson II*, Pet. App. 50a; *see also id.* at 49a-50a ("Here, there is no claim that the reports that BASF seeks to protect were defamatory . . . . This consumer fraud action, however, does not raise a libel claim."). To support this incredibly skimpy analysis, the court cited only its prior decision in a patent case. This Court, by contrast, rejected this very approach of "censorship by classification" in cases such as *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (applying constitutional "actual malice" standard to tort action for emotional distress), and *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (same in tort action for invasion of privacy). The urgent need for the Court's guidance on the free speech issues presented here – that are now being raised in consumer protection actions brought as class actions on behalf of many individual plaintiffs – could not be more apparent. *See, e.g., Kasky*, 539 U.S. 654, 123 S. Ct. at 2568 (Breyer, J., dissenting) ("refusal immediately to review the state-court decision before us will 'seriously erode' the federal constitutional policy in favor of free speech" and "may well 'chill' the exercise of free speech rights").

B. The Court Should Take the Opportunity to Hold that the "Commercial Speech" Label Alone Does Not Fix the Level of Constitutional Protection.

This case provides an important opportunity to address the proper treatment of commercial speech. Although no

comprehensive reassessment of *Central Hudson* is required to decide this case, the Court would foster the fundamental values underlying freedom of speech by confirming that each speaker on matters of public concern is to be treated equally under the law, regardless of whether the speaker is deemed to be engaging in "commercial" speech. This is familiar jurisprudential terrain; a neutrality principle has long been embedded in the Court's First Amendment jurisprudence. *See, e.g., R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992). Thus, it is now a commonplace that the government may not discriminate among speakers by "licens[ing] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id.*

Yet that is precisely the result ordained by the Minnesota courts here, when they concluded that the First Amendment has *no* place in a "consumer fraud" action. Therefore, the Court should take this opportunity to hold that even if a corporation's speech on a public policy matter is deemed to be "commercial speech," it cannot be punished without the same showing of fault (be it negligence or actual malice) that is required in an action brought against any other participant in the public debate (such as a defamation suit brought by the corporation). *Cf. Kasky*, 539 U.S. 654, 123 S. Ct. at 2567 (Breyer, J., dissenting) (such laws create "concern that the commercial speaker engaging in public debate suffers a handicap that noncommercial opponents do not").

A contrary conclusion would leave First Amendment freedoms hanging by too slender a thread. In this case, the *Sugarbeet Grower* article was plainly not "commercial" because it did not address the attributes of goods or services that BASF offered for sale. But typically, the determination whether speech is "commercial" turns on "a matter of degree," as the Court has noted. *Discovery Network*, 507 U.S. at 423. Indeed, Justice Thomas has expressed "doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech." *Lorillard*,

533 U.S. at 575 (Thomas, J., concurring); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) (commenting on the "artificiality of a rigid commercial/non-commercial distinction"); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 628 (1990) ("the commercial/noncommercial distinction makes no sense").

Under the holding in *Peterson II*, however, a distinction that often rests on a minor difference in degree is transformed into a major difference in kind. If BASF's speech is not commercial, then it is entitled to full First Amendment protection. But if it *is* commercial, then it is entitled to *no* protection, at least when it is challenged in a "consumer fraud" action. Especially given the tenuousness of the distinction between commercial and noncommercial speech, and the enormity of the stakes in "consumer fraud" cases, this sharp disparity in treatment makes little sense. As one court has pointedly noted, "using the mere identification of commercial speech as the analytic tool [would] operate with a meat cleaver instead of a scalpel, and would amputate much of the core of protected speech from the body of the First Amendment." *National Life Ins. Co. v. Phillips Publ'g, Inc.*, 793 F. Supp. 627, 646 (D. Md. 1992). The Court tried to address these free speech issues last term, but ultimately left them unresolved. *See Kasky*, 539 U.S. 654, 123 S. Ct. at 2558 (Stevens, J., concurring) ("This case presents novel First Amendment questions because the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance.").

Of course, the simplest way to resolve this case would be to hold that BASF's speech was not "commercial." But if this Court were to hold that the speech at issue was commercial, then it should also hold that the status of this speech as "commercial" speech is not dispositive of the level of constitutional protection that should be afforded. Instead, the bedrock neutrality principle dictates that however

BASF's speech is labeled, it must be treated the same as all other speech that occurs in the course of the same public policy debate. *See, e.g., id.* at 2559 (Stevens, J., concurring) ("The interest in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore also a matter of great importance.").

III. THE COURT'S REVIEW IS NEEDED TO PREVENT IMMEDIATE AND NATIONWIDE SUPPRESSION OF SPEECH ON IMPORTANT PUBLIC POLICY MATTERS.

The Court's plenary review in this case is needed to prevent immediate harm. The confusion spawned by the Court's "commercial speech" precedents makes it extremely difficult for corporate counsel to determine which statements are fully protected and which are not. Such uncertainty can only "inhibit the exercise of [First Amendment] freedoms" by "lead[ing] citizens to steer far wider of the unlawful zone . . . than if the boundaries were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (quotation omitted). The inconclusive result last Term in *Kasky* merely underscores the immediacy of these problems. *See, e.g., Kasky*, 539 U.S. 654, 123 S. Ct. at 2560 (Breyer, J., dissenting) ("delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on").

The decision below heightens the need to clarify the proper boundaries of the Court's free speech doctrines. The increasingly nationwide nature of corporate speech means that the law of the least-protective jurisdiction effectively governs statements made by corporations everywhere. If one jurisdiction can punish this kind of speech in a consumer class action, then as a practical matter, speakers nationwide will be prevented from disseminating such speech at all.

The upshot of the ruling below is that *most* corporate speech can be classified as "commercial" speech, including

all statements of fact: (i) made by persons engaged in commerce (including all businesses); (ii) made to an audience that includes actual or potential purchasers or users of their products; and (iii) addressed to any matter in which the speaker has a commercial interest (including a trade journal article or government report), even if that speech is focused on a public policy matter of obvious public concern.

As a result, companies now face the unhappy choice of either remaining quiet on important public policy debates concerning their own operations, or facing liability for any statements made in the context of heated and fast-moving debate, simply because they have a commercial interest in the issues being debated. The risks of being sued and found liable are far from trivial, since many state consumer protection laws have relaxed the constraints on traditional fraud actions – such as proof of *scienter* and reliance.

This regime cannot be squared with bedrock principles of free speech. The decision below forces responsible corporate citizens to curtail their involvement in public debate, lest they risk a consumer fraud lawsuit premised on "impure" corporate motivations. For example:

> fast-food companies often encourage children to exercise and stay in school;
>
> energy companies support conservation and efforts to develop alternative fuel sources;
>
> alcoholic beverage manufacturers encourage consumers to drink responsibly;
>
> athletic apparel companies trumpet financial contributions to after-school programs; and
>
> entertainment companies run advertisements that encourage students to read.

Under the rulings below, these types of speech create potential liability and are punishable by an award of treble

damages. Yet in each instance, a corporate speaker addresses the American public (including its customers) on matters involving the effects of its own business operations, which are also matters of public concern. And in each instance, a plaintiff might sue under state consumer protection laws) based on even *truthful statements* made by the company in public policy debates. Thus, if the Court were to deny *certiorari*, then companies nationwide (and even worldwide) could only speak on matters of great public concern if they were willing to risk a civil judgment against them based on such expansive application of state consumer fraud laws. The regime envisioned is utterly inhospitable to free speech in disregard of the Constitution. *See, e.g., Kasky*, 539 U.S. 654, 123 S. Ct. at 2568 (Breyer, J., dissenting) ("refusal immediately to review the state-court decision before us will 'seriously erode' the federal constitutional policy in favor of free speech" and "may well 'chill' the exercise of free speech rights"). This Court alone can and should make that dominant fact clear to all concerned.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

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No. 04-81

IN THE
Supreme Court of the United States

BASF CORPORATION,
Petitioner,
v.
RONALD PETERSON, ET AL.,
Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of Minnesota

MOTION OF CROPLIFE AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Sup. Ct. R. 37.2(b), CropLife America hereby moves for leave to file the accompanying *amicus curiae* brief in support of the petition for a writ of certiorari. Although counsel for petitioner BASF Corporation has consented to the filing of the brief, respondents' counsel has withheld consent.

CropLife America is a national, not-for-profit trade association which promotes the environmentally sound use of crop protection products (including various types of herbicides, insecticides, fungicides, and other pesticides) for the economical production of safe, high quality, and abundant food, fiber, and other crops. Established in 1933, CropLife America (formerly known as the American Crop Protection Association and, before that, the National Agricultural Chemicals Association) represents the developers, manufacturers, formulators, and distributors of plant science solutions for agricultural pest management in the United States. The association's members produce, sell, and distribute virtually all of the agricultural pesticides and biotechnology products used by American farmers.

CropLife America frequently participates as *amicus curiae* in cases, like this one, which raise important issues arising under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136-136y (2000). FIFRA, the comprehensive federal pesticide regulatory statute, is administered by the United States Environmental Protection Agency ("EPA"). The association's members (which include BASF) have a particular interest in ensuring that courts, when confronted with state law liability claims that directly or indirectly attack a pesticide's EPA-regulated product labeling, properly apply FIFRA's preemption provision, § 136v(b), which expressly prohibits the states

from imposing their own additional or different requirements for pesticide labeling. Because this case raises a significant FIFRA preemption question that potentially affects many of the association's members, CropLife America filed *amicus curiae* briefs in the Minnesota state supreme court and state court of appeals proceedings below. During the past fifteen years, CropLife America has filed *amicus curiae* briefs in other key appeals involving the preemptive scope of FIFRA, including before this Court in *American Cyanamid Co. v. Geye,* 79 S.W.3d 21 (Tex. 2002), *cert. denied*, 123 S.Ct. 2637 (2003), and *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991).

This case raises additional issues relating to subjects in which CropLife America has a substantial interest. More specifically, the association and its members have a vital interest in promoting the safe and effective use of pesticides, and in discouraging their misuse, such as when a FIFRA-registered product is applied to crops that are not included on its EPA-approved labeling. Further, as responsible product stewards, the association's members have an abiding interest in adequately testing their pesticide products before making them available for use by farmers on particular types of crops.

CropLife America wishes to share with the Court its perspective on why the far-reaching issues raised by this appeal warrant review. Accordingly, the association's

motion for leave to file the accompanying *amicus curiae* brief should be granted.

Respectfully submitted,

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40 C.F.R. § 156.10(a)(1) 12

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40 C.F.R. § 156.10(i)(2)(iii) 9

49 Fed. Reg. 37,960 (1984) 6, 10, 11

53 Fed. Reg. 15,952 (1988) 10

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Miscellaneous

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BRIEF OF CROPLIFE AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

The Court should grant the petition because unless the decision below is reversed, it will have nationwide reverberations that destabilize the underpinnings of the federal/state pesticide regulatory scheme, stifle innovative activity within the pesticide industry, and impair American farmers' already precarious ability to produce a broad variety of food crops in a cost-effective manner. There are at least five reasons why the lower court's opinion is a destructive precedent which warrants this Court's review:

First, the opinion below allows individual state court juries to usurp EPA's exclusive authority under FIFRA to establish requirements for the content and format of a pesticide product's nationally uniform labeling, including with regard to listing the agricultural crops on which a product may be lawfully (and safely) applied. *Second*, the opinion below transforms a voluntarily obtained FIFRA registration into both an unqualified license and a state law duty to sell a product throughout the United States for all of

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[1] Pursuant to Sup. Ct. R. 37.6, CropLife America states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

its federally registered uses; the opinion thereby not only encroaches upon business prerogatives, but also each state's authority to restrict, based on agricultural, environmental and other factors within its own borders, the sale and use of FIFRA-registered pesticides, such as by determining on which crops within the state a product can be safely used. *Third*, the opinion below undermines FIFRA's crucial prohibition against using a pesticide in a manner inconsistent with its EPA-approved labeling, such as by applying a product to crops that are not included on its labeling. *Fourth*, the opinion below discourages adequate pre-market testing of pesticide products to ensure that they are safe and effective for use on particular types of crops. *Fifth*, the opinion below eliminates pesticide manufacturers' already tenuous economic incentives for developing and marketing products that are suitable for use on low-acreage "minor" crops such as fruits and vegetables, which have high economic value to farmers and nutritional benefits for consumers.

If the opinion below is allowed to stand, these and other pernicious consequences will emanate from the lower court's failure to apply the well established principle that FIFRA preempts any type of state law claim, no matter how denominated, that has the effect of challenging a pesticide product's EPA-approved labeling.

ARGUMENT

CropLife America and its members view the Minnesota Supreme Court's decision in this nationwide class action as a serious threat to the structure and operation of the federal/state pesticide regulatory scheme. That court's opinion upholds a jury verdict which requires an R&D-oriented pesticide manufacturer to pay tens of millions of dollars under a state consumer fraud statute on the theory that it engaged in an "unconscionable commercial practice" by distributing a FIFRA-registered product with EPA-

authorized and approved "subset" labeling, and by advocating against unlawful, potentially hazardous, off-label use of pesticides. If left undisturbed, this decision will continue to engender tremendous confusion and uncertainty within the regulated community, and in view of the potential financial rewards, almost certainly will spawn additional highly contrived "consumer fraud" suits that further erode the pesticide regulatory scheme. Because the issues raised in the petition are unlikely to be resolved by *Bates v. Dow AgroSciences LLC*, *cert. granted*, 2004 WL 143958 (U.S. June 28, 2004) (No. 03-388), another FIFRA preemption case, the Court should grant review here as well.

I. REVIEW IS NEEDED BECAUSE THE LOWER COURT'S DECISION UNDERMINES THE STRUCTURE AND DISRUPTS THE OPERATION OF THE FEDERAL/STATE PESTICIDE REGULATORY SCHEME

More than thirty years ago, Congress "transformed FIFRA . . . into a comprehensive regulatory statute" governing the registration, labeling, sale, and use of pesticides. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). The Act "establishes 'a coordinated Federal-State administrative system to carry out the new program.' " *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 615 (1991) (quoting H.R. REP. NO. 92-511, at 1 (1971)). Under this federal/state "regulatory partnership" (*ibid.*), the "states have joint control with the federal government in regulating the use of pesticides . . . with the exception of the EPA's exclusive supervision of labeling." *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115, 118 (2d Cir. 1989).

No pesticide may be distributed or sold unless it is registered under FIFRA. 7 U.S.C. § 136a(a). Prior to granting a registration, EPA must determine that a pesticide's labeling complies with the requirements of the Act. *Id.* § 136a(c)(5)(B). To maintain national labeling

uniformity for each FIFRA-registered product, and thereby preserve the integrity, force, and effect of FIFRA's labeling requirements as implemented by EPA, § 136v(b) provides that a "State shall not impose or continue in effect *any requirements for labeling* or packaging *in addition to or different from* those required under [FIFRA]." *Id.* § 136v(b) (emphasis added). Congress intended § 136v(b) "to completely preempt State authority in regard to labeling." H.R. REP. NO. 92-511, at 16 (1971); *see Mortier*, 501 U.S. at 615 (labeling "fall[s] within an area that FIFRA's 'program' pre-empts").

Although § 136v(b) expressly preempts the states from imposing additional or different requirements for labeling, § 136v(a) specifies that the states may "regulate the *sale or use* of any federally registered pesticide," provided that such regulation "does not permit any sale or use prohibited by [FIFRA]." 7 U.S.C. § 136v(a) (emphasis added); *see Mortier*, 501 U.S. at 614 ("§ 136v(a) . . . acts to ensure that the States could continue to regulate use and sales even where, such as with regard to the banning of mislabeled products, a narrow pre-emptive overlap might occur"). Pursuant to this authority, the states have established their own individual state pesticide registration requirements, with which every FIFRA-registered product must comply prior to being sold or used. *See* Tr. 2007:15-24; 2010:6-2011:1; 2068:5-2069:24; 2604:3-9; 2606:22-24; 2612:9-2613:7; 2615:13-2616:11 (testimony of parties' regulatory experts regarding state pesticide registration requirements geared to state and local agricultural and environmental conditions).

Thus, under the federal/state scheme, a product *cannot* be lawfully marketed, advertised, sold, or used for a federally registered use (*i.e.*, crop) in a particular state *unless and until* the state's pesticide regulatory agency, pursuant to the state's own pesticide registration requirements, has

approved the product for that use in that state. In other words, a FIFRA registration *alone* is not a license to sell or use a pesticide product anywhere. *See Mortier,* 501 U.S. at 613-14 ("FIFRA nowhere seeks to establish an affirmative permit scheme for the actual use of pesticides. It certainly does not equate registration and labeling requirements with a general approval to apply pesticides throughout the Nation without regard to regional and local factors like climate, population, geography, and water supply.").

FIFRA's unequivocal prohibition against use of "any registered pesticide in a manner inconsistent with its labeling" (7 U.S.C. § 136j(a)(2)(G)) is another fundamental component of the regulatory scheme. Under this prohibition against misuse of pesticides, applying a product for a use (*i.e.,* to a crop) not included on the labeling is unlawful. Although FIFRA reserves to EPA alone the authority to regulate the content and format of pesticide labeling, Congress, in order to strengthen the federal/state pesticide regulatory partnership, vested *the states* with the "primary enforcement responsibility for pesticide use violations" under FIFRA. *Id.* § 136w-1(a).

The Minnesota Supreme Court's opinion turns this carefully balanced federal/state regulatory scheme on its head. The opinion directly conflicts with § 136v(b) of FIFRA by empowering individual juries to second-guess EPA's labeling regulations (such as the subset labeling regulation) and impose, through the potent method of state law damages awards, their own additional or different requirements for whatever they consider to be proper labeling. Moreover, although FIFRA makes the states responsible for enforcing the Act's critically important prohibition against using a product in a manner inconsistent with its labeling, the lower court's ruling approves the imposition of state law liability for a manufacturer's

facilitating compliance with, and enforcement of, that prohibition.

A. The Opinion Below Imposes State Law Liability for Deceptive Labeling, Even Though *Only EPA* Has Authority To Determine Whether a Product's Labeling Is Deceptive

As the petition explains (Pet. at 8, 11-13), the state supreme court failed to recognize that the trial court's judgment rested on respondents' repeated contentions that petitioner BASF's EPA-approved Poast Plus labeling was deceptive. By affirming that judgment, the decision below squarely conflicts with the federal/state scheme, under which EPA has exclusive authority to determine whether a product's labeling is false or misleading (*i.e.*, deceptive). Nothing in the record suggests that EPA ever made any such determination regarding the EPA-approved labeling at issue in this case.

The Court on previous occasions has acknowledged "FIFRA's historic focus on labeling." *Mortier*, 501 U.S. at 613; *see also Monsanto*, 467 U.S. at 991. This includes the statute's prohibition against labeling which is false or misleading. More specifically, FIFRA makes it unlawful "for any person in any State to distribute or sell to any person . . . any pesticide which is . . . misbranded." 7 U.S.C. § 136j(a)(1)(E); *see generally* 49 Fed. Reg. 37,960 (1984) ("The statutory standard that is the basis for Agency regulation of pesticide labeling is contained in section [136(q)] of FIFRA, which defines a 'misbranded' pesticide and enumerates specific labeling deficiencies that constitute misbranding."). Importantly, "[a] pesticide is misbranded if . . . its labeling . . . is *false or misleading* in any particular." 7 U.S.C. § 136(q)(1)(A) (emphasis added). EPA's registration and labeling regulations hammer this point home: EPA "will approve an application" for registration of

a pesticide product "*only if* . . . [t]he Agency has determined that the product is not misbranded." 40 C.F.R. § 152.112(f) (emphasis added); *see also id.* § 156.10(a)(5) (providing examples of false or misleading label statements or representations); EPA, Label Review Manual (3d. ed.), Ch. 12: Labeling Claims, at Parts II - III (internal guidance to EPA reviewers on false and misleading labeling).

Because § 136v(b) of FIFRA prohibits the states from imposing their own additional or different requirements for labeling, *only EPA*, and not the states, can determine whether a pesticide product's labeling is deceptive. Absent such an EPA determination, a state law claim implying that a pesticide product's EPA-approved labeling is deceptive necessarily imposes a state law requirement for labeling that is "in addition to or different from" EPA's requirements for labeling, and therefore, is expressly preempted. *See Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993) (§ 136v(b) expressly preempts plaintiffs' state law claim that a FIFRA-registered pesticide was "misbranded" because "it is for the EPA Administrator, not a jury, to determine whether labelling and packaging information is incomplete or inaccurate, and if so, what label changes, if any, should be made. . . . FIFRA leaves states with no authority to police manufacturers' compliance with the federal procedures"); *see also Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887, 888 (8th Cir. 1994) ("in the context of FIFRA . . . actual agency approval eliminates any possible claims under state tort law for failure to comply with federal [labeling] requirements") (internal quotation omitted); *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994) (if plaintiffs "could recover large damage awards because the herbicide was improperly labeled under state law, the undeniable practical effect would be that state law *requires* additional labeling standards not mandated by FIFRA"). "To hold otherwise would be to allow state courts to sit, in effect, as super-EPA review boards that could question the adequacy of the EPA's

determination of whether a pesticide registrant successfully complied with the specific labeling requirements of its own regulations." *Welchert v. American Cyanamid*, 59 F.3d 69, 73 (8th Cir. 1995).

Because the opinion below abrogates EPA's exclusive authority to regulate pesticide labeling, and arrogates that function to individual juries whose vagaries regarding what constitutes proper labeling will destroy the national labeling uniformity that Congress mandated, this case warrants the Court's scrutiny.

B. The Opinion Below Imposes State Law Liability for Utilizing EPA-Authorized Subset Labeling, Which Is An Essential Component of the Federal/State Regulatory Scheme, and a Common and Beneficial Commercial Practice

FIFRA preemption does not depend upon "the guise under which the claim is presented." *Netland v. Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir.), *cert. denied*, 123 S.Ct. 415 (2002); *see also Traube v. Freund*, 775 N.E.2d 212, 217 (Ill. App. 2002) ("FIFRA preemption clearly does not turn upon the name a plaintiff gives to his or her cause of action."). Nevertheless, under the guise of a state law claim for "unconscionable commercial practice," BASF was held liable for marketing a pesticide product (Poast Plus) with *EPA-approved* product labeling that respondents contended was deceptive because, *as allowed by EPA's subset labeling regulation*, it did not include each of the minor crops for which the product was registered under FIFRA. *See* Pet. at 12-13. The state supreme court's opinion affirming that a pesticide manufacturer's use of such EPA-authorized subset labeling represents an unconscionable commercial practice thwarts the objectives of this necessary and widely utilized practice, which is highly beneficial to pesticide users as well as manufacturers.

The subset labeling regulation, 40 C.F.R. § 152.130(b), allows a pesticide manufacturer to distribute a product with labeling that includes less than all of its FIFRA-registered uses:

> A registrant may distribute or sell a product *under labeling bearing any subset* of the approved directions for use, provided that in *limiting the uses listed on the label*, no changes would be necessary in precautionary statements, use classification, or packaging of the product.

Ibid. (emphasis added).[2] In other words, EPA does not require the labeling accompanying a pesticide product to include all of the uses that EPA has approved (*i.e.*, registered) under FIFRA for that product. Instead, the manufacturer may utilize what is commonly known as "subset labeling."

EPA's subset labeling regulation makes it clear that a manufacturer is not required to include on an agricultural pesticide product's labeling, all of the crops encompassed by that product's FIFRA registration. Without subset labeling, the manufacturer would have to include all FIFRA-registered crops, even those for which a state registration has not been sought or obtained. Selling the product with such all-encompassing labeling would violate that state's registration requirements. As a result, the manufacturer could not lawfully sell the product at all within that state, not even for use on the crops which have received the state's approval. Farmers then would be deprived of beneficial crop protection

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[2] Directions for use must include, *inter alia*, "[t]he site(s) of application, as for example the crops . . . to be treated." 40 C.F.R. § 156.10(i)(2)(iii).

products. Alternatively, a manufacturer could seek state registration before a product is fully tested for use on specific crops under the soil, climatic, environmental, and other conditions present in the particular state or region. That, too, would be problematic for both farmers and manufacturers. Therefore, subset labeling is a regulatory necessity. It enables a FIFRA-registered product to be sold for those crops which have received state as well as EPA approval, while avoiding violation of state registration requirements for other crops. Equally important, it affords a manufacturer the opportunity to complete safety testing of the product on such other crops before seeking state registrations.

Furthermore, including all crops covered by a FIFRA registration on a product's labeling can make the directions for use and environmental precautions unnecessarily long and complicated, and thus, difficult for applicators to read, understand, and follow. That in turn can lead to accidental misuse and possible human, crop, or environmental injury. EPA long has recognized that "labeling of greater length, detail and complexity than is desirable from a user point of view" should be avoided. 49 Fed. Reg. at 37,971. For this reason, subset labeling promotes safe and effective use of pesticides.

Subset labeling also is important for commercial reasons. When EPA promulgated the subset labeling regulation in 1988, it formalized a longstanding policy which affords manufacturers flexibility in deciding how to market multi-use (*e.g.*, multi-crop) products. *See* 53 Fed. Reg. 15,952, 15,957 (1988) ("A company having a registered product is permitted (both by current policy and by this final rule) to market the product in a variety of ways."). Thus, a "product may be marketed . . . *bearing different subsets of approved uses* . . . to distinguish primary uses for different regions of the country." *Ibid.* (emphasis added). For

example, utilizing subset labeling, a manufacturer is permitted to sell the same herbicide product in Mississippi labeled only for use on cotton and in Iowa labeled only for use on corn. Along the same lines, subset labeling affords a manufacturer the flexibility to address special regional or local considerations (*e.g.*, soil types, climatic parameters, pest biotypes, and presence of endangered species), for safe and efficacious use of a product on a particular type of crop.

Also, a pesticide product's FIFRA registration may cover both agricultural crop uses and non-agricultural uses (*e.g.*, home, lawn, and garden uses). In such a case, a manufacturer can use subset labeling to distinguish between the agricultural and non-agricultural uses of the same product, which might be packaged (as well as labeled) differently for each category. Without subset labeling, manufacturers would have to try to obtain multiple FIFRA registrations for the same product in order to avoid including agricultural and non-agricultural uses on the same labeling. But "[e]xpanding usage of a single product is often more desirable from a marketing perspective (and usually easier to accomplish) than registering a number of similar products, each with fewer uses." 49 Fed. Reg. at 37,971. Thus, subset labeling conserves EPA's limited resources and provides a way for manufacturers to select from among a product's EPA-approved uses, those that meet the needs of different types of users.

The opinion below severely disrupts the federal/state regulatory scheme by rendering use of subset labeling a perilous practice. Yet, the subset labeling regulation, which specifically authorized BASF to omit minor crop uses from its Poast Plus labeling, necessarily represents EPA's determination that including less than all FIFRA-registered crops on an agricultural pesticide product's labeling does *not* render that labeling deceptive. As a result, any state law claim, such as respondents' claims here, which directly or

indirectly challenge a manufacturer's omission of FIFRA-registered crops from an agricultural pesticide product's labeling, has the inevitable effect of imposing a state requirement for labeling (*i.e.*, a requirement to list all FIFRA-registered crops) which is "in addition to or different from" EPA's labeling requirements, and therefore, is expressly preempted by § 136v(b). For the same reason, state law claims based on advertising or promotional statements which, consistent with a product's EPA-approved subset labeling, do not disclose every FIFRA-registered crop, are expressly preempted. *See generally Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 663 (7th Cir. 1997) ("FIFRA preempts state law claims when the challenged advertising merely reiterates the label.").

Thus, contrary to the opinion below, respondents' claims regarding BASF's decision to refrain from marketing Poast Plus for minor crops are not based on conduct "that went beyond the label" (Pet. App., 20a). Instead, those claims necessarily challenge the subset labeling regulation, and therefore, are squarely within "the reach of federal law" (*id.*) and FIFRA's preemption provision.[3]

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[3] Respondents also contended that the EPA-approved Poast Plus labeling was deceptive because it differed from the labeling of a different, separately registered BASF product, Poast, which contained the same active ingredient, but unlike Poast Plus, contained no special adjuvant and included minor crops on its labeling. *See* Pet. at 4, 13, 16. EPA, however, requires each separately registered product to have its own separately approved labeling. *See* 40 C.F.R. §§ 152.130(a), 156.10(a)(1). Thus, state law claims based on the theory that different products, like Poast and Poast Plus, should be labeled *identically* would impose labeling requirements which are "in addition to or different from"

(Footnote cont'd on next page.)

C. The Opinion Below Imposes State Law Liability for Advocating Compliance With, and Facilitating Enforcement of, FIFRA's Prohibition Against Misuse of Pesticides, Which Is a Fundamental Precept of the Federal/State Regulatory Scheme

Respondents contended at trial that BASF also engaged in "unconscionable" conduct by sponsoring a magazine article reminding readers that off-label use of pesticides (*e.g.*, use of a pesticide product on crops not included on its labeling) is unlawful, and by providing information to state pesticide enforcement officials which led to successful prosecutions of certain pesticide dealers and farmers for off-label use of Poast Plus. *See* Pet. at 2. The opinion below affirms imposition of state law liability based in part on these entirely appropriate and beneficial product stewardship activities.

(Footnote cont'd from previous page.)

those imposed under FIFRA by EPA, and therefore, are preempted by § 136v(b). As to respondents' claim that the name "Poast Plus" was deceptive, that too is preempted for the same reason. Indeed, EPA requires different products to have different names for the very purpose of avoiding confusion, if not deception. *See* EPA Label Review Manual (3d. ed.), Ch. 12: Labeling Claims, at Part IV.C ("The exact same name cannot be used for different products registered by any one registrant. The product name must be sufficiently different to clearly distinguish one product from another."); *see also* 67 Fed. Reg. 14,941 (2002) (announcing the availability of draft EPA guidance on false or misleading pesticide product names).

Off-label use (*i.e.*, misuse) of agricultural pesticide products can cause serious problems such as crop damage, illegal pesticide residues in food crops, pesticide drift or runoff, and hazards to applicators, bystanders, domestic animals, and wildlife. The lower court's ruling, which harshly penalizes BASF for advocating against the off-label use of pesticides in general and Poast Plus in particular, sends shockwaves through the federal/state regulatory structure. If left undisturbed, the opinion below will leave manufacturers with the Hobson's choice of either looking the other way when they suspect that their products are being misused, or incurring the risk of massive state law liability for "unconscionable" conduct by reporting possible misuse. Either way, the impact of the state supreme court's opinion severely undermines FIFRA's prohibition against misuse of pesticides.

> When Congress rewrote the statute in 1972, it
>
> significantly strengthened FIFRA's registration and labeling standards. 7 U.S.C. § 136a. To help make certain that pesticides would be applied in accordance with these standards, the revisions further insured that FIFRA "*regulated the use*, as well as the sale and labeling, of pesticides. . . ."

Mortier, 501 U.S. at 601 (quoting *Ruckelshaus*, 467 U.S. at 991-92) (emphasis added). Prior to 1972, FIFRA contained "no prohibition . . . against the misuse of a registered pesticide." S. REP. NO. 92-838, at 4 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3996. In order to correct this deficiency, Congress added § 136j(a)(2)(G), which makes it "unlawful for any person . . . to use any registered pesticide in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G). "By prohibiting the misuse of pesticides," Congress intended to "protect the environment and also prevent the growth of commonly recognized practices which

would require the cancellation of registration of a pesticide. . . ." 1972 U.S.C.C.A.N. at 3997-98.

FIFRA's prohibition against using a pesticide in a manner inconsistent with its labeling is commonly known by the maxim "The Label is the Law." During the trial court proceedings below, Dan Barolo, who served as Director of EPA's Office of Pesticide Programs, testified that "[t]he absolute underpinning and foundation of the program is embodied in this particular statement." Tr. 2556. The record of this case reflects that when North Dakota's agriculture commissioner requested EPA to provide an "enforcement waiver" so that farmers could brazenly violate § 136j(a)(2)(G) by applying Poast Plus for crops not listed on its labeling, Dr. Lynn Goldman, EPA's Assistant Administrator for pesticides, responded as follows:

> It is critical for us to keep in mind that, under FIFRA, *the label is the law.* FIFRA § 12(a)(2)(G) [7 U.S.C. § 136j(a)(2)(G)] makes it unlawful to use any pesticide in a manner inconsistent with its labeling. ... *To move away from this basic precept* and inform farmers that it is acceptable to substitute different products with different approved labels has *serious national implications with regard to the health and safety of farmers and workers.* ... One common understanding across the country regarding pesticide applications is that users must follow the label. ... If EPA were to *undermine the basic understanding by farmers that they must follow the labeling on a specific product, we would cause confusion in the regulated community, and, in effect, be encouraging pesticide misuse.*

D. Ex. 636 (emphasis added). By holding a pesticide manufacturer liable for actively discouraging the misuse of agricultural pesticides, the Minnesota Supreme Court's opinion causes the exact type of "serious national

implications" and "confusion in the regulated community" which EPA sought to prevent by refusing an "enforcement waiver" for off-label use of Poast Plus. The lower court's decision may even embolden certain farmers to violate FIFRA (and corresponding state regulatory statutes) by applying pesticide products to crops which are not included on a product's labeling or approved for use by state regulatory agencies.

Congress decided to rely upon the states to enforce FIFRA's prohibition against misuse of pesticides. *See* 7 U.S.C. § 136w-1(a) ("State Primary Enforcement Responsibility"). The lower court's opinion warrants this Court's review because it flouts that important statutory responsibility by condoning imposition of state law liability on a manufacturer for promoting compliance with pesticide labeling and for advocating against misuse.

II. REVIEW IS NEEDED BECAUSE THE LOWER COURT'S DECISION IS HIGHLY DETRIMENTAL TO AGRICULTURE

Respondents took the position that BASF's conduct was "unconscionable" because the company exercised its prerogative to make Poast, but not the lower-priced Poast Plus, available for use on minor crops. Unless reviewed and reversed, the state supreme court's refusal to overturn the jury's astronomical damages award based on respondents' concocted and outlandish consumer fraud theories will deter pesticide manufacturers from developing and marketing pesticides needed by farmers for economical production of minor crops.

As the lower court indicated, " '[m]ajor,' or high acreage crops [wheat; corn; soybeans; cotton] are farmed on millions of acres of land but provide a relatively low financial return per acre." Pet. App., 2a. In contrast, " '[m]inor,' or high value crops [all fruits and vegetables, and dozens of other types of non-major crops] are farmed on

fewer acres, but yield a much greater profit per acre." *Ibid.* Although "minor" crops are grown on less acreage than major crops, their production is a cornerstone of American agriculture, and their abundant availability is taken for granted by the consuming public. Nevertheless, the costs of generating crop residue and other data required for FIFRA registration of a pesticide product on a low-acreage minor crop are the same as for a high-acreage major crop. For this reason, it is much more difficult for a manufacturer to recoup data development and other registration costs for minor crops. Indeed, for some minor crops the costs of registration data development *exceed* the manufacturer's market potential for that crop.

Thus, as the lower court acknowledged, pesticide manufacturers' economic incentives for entering minor crop markets are precarious:

> According to research funded by the United States Department of Agriculture, the herbicide market for minor crops has little competition because the market potential for a pest control product on specific crops is low, *giving agricultural companies little incentive to absorb the cost of developing the data necessary for registration of a herbicide on individual crops, particularly minor crops.*

Ibid. (emphasis added). Because of the long-standing need to maintain and bolster pesticide manufacturers' incentives to develop products suitable for use on minor crops, Interregional Research Project No. 4 ("IR-4") was established in 1963 as a cooperative effort between USDA and state agricultural research centers. *See* Tr. 3245. IR-4 Executive Director Robert Holm testified at the trial below that the program's "sole purpose is to provide crop-protection solutions for minor crop growers, the rationale being that . . . crop-protection companies *lacked the economic incentive* to

develop their chemicals on minor crops." *Id.* 3246 (emphasis added).

The lower court's decision shatters whatever fragile incentives manufacturers like BASF may have for diverting limited R&D resources to development of test data needed to register new or existing pesticides for use on minor crops. Indeed, the ruling foists massive financial liability upon BASF *for the very reason* that it made such an investment by registering its thoroughly tested, cost-effective, Poast herbicide, on both a federal and state level, for use on dozens of minor crops (*see* Pet. at 4), but refrained from doing the same for the newer Poast Plus, which had not been adequately tested for phytotoxicity (*i.e.*, potential injury) to minor crops (*id.* at 5).

Responsible product stewards like BASF exhaustively test their products for phytotoxicity on a crop-by-crop basis before making them available to farmers. Moreover, testing typically has to be conducted on a regional or local basis, in order to take into account differing soil, terrain, climatic, environmental, and other conditions. In addition, because farmers commonly "tank mix" different pesticide products prior to application, testing on various combinations of products often has to be conducted to ascertain whether a tank mixture will be phytotoxic when applied to crops grown in a particular state or region. The results of these and other types of phytotoxicity testing very well may determine the particular states in which a product will be sold, and thus, registered.

The lower court's ruling, however, penalizes BASF's forbearance from rushing to farmers a product which had not been fully tested for phytotoxicity on minor crops. Growers can hardly afford to destroy or damage their low-acreage minor crops with an inadequately tested product or tank mixture. Nor can pesticide manufacturers bear that risk. As a result, the decision below virtually demolishes already

scant incentives for manufacturers to develop or expand products for use on minor crops. If the ruling is allowed to stand, the inevitable consequence will be that many minor crop growers throughout the nation will be deprived of the pesticide products that they need because a small group of growers filed this suit to retroactively increase their profits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

RESPONDENT FARMERS' SUPPLEMENTAL BRIEF ADDRESSING PETITIONER BASF'S AMICUS BRIEF IN *BATES V. DOW AGROSCIENCES* (NO. 03-388) IMPROPERLY ARGUING MERITS OF PETITION FOR A WRIT IN *BASF V. PETERSON* (NO. 04-81) WITHOUT NOTIFYING FARMERS' COUNSEL AND INCREDULOUSLY COMPLAINING THAT *PETERSON* JURY'S "FRAUDULENT MARKETING" VERDICT REQUIRES BASF TO CHANGE PRODUCT LABELS

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I. SUMMARY ARGUMENT

Respondents (Farmers) submit this supplemental brief in *BASF Corporation v. Ronald Peterson, et al.* (No. 04-81) (*Peterson*), pursuant to Sup. Ct. R. 18.10, in opposition to Petitioner BASF Corporation's (BASF) November 24, 2004 amicus submission in *Dow Agrosciences LLC v. Bates*, 332 F.3d 323 (5th Cir. 2003), *cert. granted*, 2004 WL 1431958 (U.S. June 28, 2004) (No. 03-388) (*Bates*). BASF's *Bates* submission is an "intervening matter" under Rule 18.10 meriting this supplemental brief by Farmers in advance of January 10, 2004 oral argument in *Bates*.

BASF's *Bates* brief egregiously misstates the facts and legal issues in BASF's pending petition for a writ of certiorari in *Peterson*, submitted for October 29, 2004 bench conference, without notice and service of a copy of the *Bates* brief on Farmers' counsel. BASF's effete effort to utilize *Bates* to gain an unfair tactical advantage in *Peterson* should not be countenanced.

The *Peterson* jury verdict does not prohibit companies like BASF from container-labeling a product for fewer crops than registered by the EPA, or naming one product as different products for sale. However, the jury verdict and unanimous Minnesota appellate rulings unequivocally recognize that a company cannot exploit a federal health and safety process to market one product "***for different uses at different prices through a 'system of deceit.'***" *Peterson v. BASF Corp.*, 657 N.W.2d 853, 860 (Minn. App. 2003) (*Peterson II*) (emphasis added). In short, fraudulent marketing schemes intended to exact higher prices from segments of the unknowing consumer market are never preempted by federal health and safety law. *Peterson v. BASF Corp.*, 675 N.W.2d 57, 62 (Minn. 2004) (*Peterson III*) ("Evidence was presented at trial that BASF's strategy was to segment the market for the products between major and minor crops . . . $4 per acre" price differential).

Farmers ask this Court to promptly deny BASF's petition as frivolous. The EPA, by its own edict in this case, does not regulate fraudulent marketing – a "***company marketing decision in which EPA has no***

input." *Peterson III*, 675 N.W.2d at 70-71 (emphasis added); PX334 (***"it is related to a marketing strategy and is not a regulatory matter."***) (emphasis added). And during trial, BASF's regulatory and marketing experts and management conceded that BASF's compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), has no relation to consumer fraud.

II. BASF IMPROPERLY FILES AMICUS BRIEF IN *BATES* ARGUING MERITS OF PETITION FOR A WRIT IN *PETERSON* WITHOUT SERVING FARMERS' COUNSEL

Before this Court is BASF's petition for a writ of certiorari asking this Court to review three unanimous published Minnesota appellate rulings and a unanimous 12-member jury verdict approving Farmers' claims that BASF engaged in a national "system of deceit" in the marketing of its Poast and Poast Plus herbicide. *See Peterson* (No. 04-81), Respondents' Brief In Opposition, September 24, 2004. Also before this Court, for oral argument on January 10, 2004, is *Bates* (No. 03-388) (whether FIFRA preempts claims of peanut crop damage caused by pesticide).

On November 24, 2004, BASF filed an amicus brief in *Bates*. ***Without serving notice and a copy of its Bates amicus filing on Peterson counsel***, BASF complains in its *Bates* amicus: "The Court's decision in [*Bates*] may substantially affect BASF's pending [*Peterson* petition]."

Farmers learned of BASF's *Bates* amicus filing on December 16, 2004, weeks after the filing. BASF's use of *Bates* to gain an unfair tactical advantage in *Peterson* – replete with egregious misrepresentation of the *Peterson* factual and legal record – should be rejected. *See, e.g.*, Minn.R.Professional Conduct 3.5(g)(2) (lawyer must provide notice to opposing counsel of any effort to communicate merits of argument with judge in pending proceeding).

III. BASF INCREDULOUSLY COMPLAINS IN ITS *BATES* BRIEF THAT *PETERSON* JURY'S UNANIMOUS "MARKETING" FRAUD VERDICT FOR FARMERS REQUIRES BASF TO CHANGE PRODUCT LABELS

A. BASF Ignores Jury Verdict And Established Evidence Of BASF's "System Of Deceit"

BASF's *Bates* filing wholly ignores the *Peterson* jury's special verdict findings and compelling evidence of BASF's "system of deceit" to exploit minor crop farmers. Under the guise of a frivolous federal preemption complaint, BASF never confronts the extensive evidence of BASF's fraudulent misrepresentations and concealment, affirmed by a unanimous Minnesota Supreme Court:

> [F]armers argue that their consumer fraud claim is not based on BASF's labels but rather on ***fraudulent marketing techniques.*** The court of appeals agreed. It held that "the farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging." *Peterson II,* 657 N.W.2d at 865. Further, the court of appeals noted that "the farmers here were not asserting that BASF's registration and container labels were false or misleading, * * * [r]ather, the farmers' point was that *even if BASF's* labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops . . .
>
> For example, the farmers presented evidence that BASF advertised Poast Plus as only "registered" for use on cotton, soybeans, peanuts, and alfalfa, and advertised that Poast was the "only" post-emergent grass herbicide registered for use on minor crops, ***which a BASF executive candidly admitted was a material omission.*** Additionally, BASF attempted to prevent word from spreading that Poast Plus was registered for use on minor

> crops. A BASF sales representative informed authorities that farmers were using Poast Plus on minor crops, BASF had its public relations firm submit a magazine article discussing increased enforcement of fines for failing to follow label recommendations, and BASF told the North Dakota Department of Agriculture that BASF could not add crops on the Poast label to the Poast Plus label because the EPA would require it to do further residue testing, which would cost the company millions of dollars. BASF's alleged unconscionable conduct went beyond the label and the reach of federal law. As an EPA representative stated in correspondence with the North Dakota Commissioner of Agriculture, the ***"problem appears to stem from a company marketing decision in which the EPA had no input."***

Peterson III, 675 N.W.2d at 70 (emphasis added).

Testified Farmers' FIFRA expert, Dr. Charles Benbrook: "It was, for approximately a five-, six-year period, price gouging." Tr.1939:17. North Dakota Agriculture Commissioner Sarah Vogel and Jack Peterson, head of pesticide enforcement for North Dakota, bluntly and repeatedly testified that BASF had lied to them: ***"[I] can take hard answers, but don't lie. Just – you don't lie."*** Tr.1878:5-6;1559:16-251;1566:17-25;1567:1;1681:17-25;1682:1-3.
BASF's management conceded that BASF's marketing for Poast/Poast Plus was misleading:

> A. (BASF's Chris Coombs) (reading from BASF marketing materials) Okay. Poast Plus is registered for use on the following crops only. Cotton, soybeans, peanuts and alfalfa.
>
> Q. ***Stop there. Do you consider it to be a material omission to say that Poast Plus is registered for use on the following crops only, cotton, soybeans, peanuts and alfalfa, when you knew that it was registered on all of the same crops as Poast?***
>
> A. ***Yes, I would consider that.***

Tr.3588:15-24.

BASF ignores the compelling and established record evidence and extensive review by the Minnesota appellate courts. And BASF disingenuously complains in its stealth *Bates* filing that the *Peterson* jury verdict attacks the pesticide label. This case was tried to a 12-member jury for five-weeks in November and December, 2001, with a unanimous jury finding that BASF engaged in "deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's ***marketing and pricing strategies***" and a "knowing omission, suppression or concealment of the truth" as part of its marketing scheme. Clerk Doc. 575 (December 6, 2001 Special Verdict); *Peterson III*, 675 N.W.2d at 63-64 ("BASF made material misrepresentations in advertisements . . . [and engaged in many other] . . . efforts to prevent farmers from learning that Poast Plus was [EPA] approved for use on the same crops as Poast."); *Peterson II*, 657 N.W.2d at 866 ("jury could conclude that BASF's marketing scheme . . . concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the NJCFA"); *Peterson v. BASF Corp.*, 618 N.W.2d 821 (Minn. App. 2000), *rev. denied* (Minn. Jan. 26, 2001) (*Peterson I*) (remanding for a jury to determine whether BASF's herbicide marketing and pricing schemes deceived farmers as a "system of deceit" to exact inflated prices from minor crop farmers).

B. BASF Ignores EPA's Pronouncement That BASF's "Marketing" Scheme Was Not Preempted

Farmers' "fraudulent marketing" case in *Peterson* has nothing to do with FIFRA preemption disputes involving injury to people and crops. The Minnesota Supreme Court in *Peterson III* acknowledged the EPA's edict that the EPA does not regulate company "marketing" of a herbicide – "***a company marketing decision in which the EPA had no input***." 675 N.W.2d at 70 (emphasis added); PX82.[1] There is

[1] As recognized in *Peterson I*, 618 N.W.2d at 824, the EPA permits a company to register an approved set of uses for a single active pesticide ingredient but container label the product sold to consumers for only some and not all of the registered uses. 40 C.F.R. §§ 152.113 and 152.130(b)

(Continued on following page)

absolutely no authority, much less a split in authority, supporting BASF's disregard of the EPA's own statements in this case, or its claim that Farmers' "fraudulent marketing" claims are preempted by FIFRA.

C. BASF Management Knew That EPA Did Not Oversee Its Marketing Practices

A confidential internal BASF memorandum circulated to BASF management states that the EPA was upset that BASF had deceived state regulators in perpetrating its Poast/Poast Plus marketing fraud: "Mr. Taylor [of EPA] told me he did not appreciate getting put in the middle of this issue since ***it is related to a marketing strategy and is not a regulatory matter***." PX334 (emphasis added).

D. BASF's Regulatory And Marketing Experts And Management Conceded At Trial That Regulatory Compliance Has No Relation To Consumer Fraud

Farmers' fraud claims were based on BASF's "marketing scheme" and were not based on "technically accurate" product labels. *Peterson II*, 657 N.W.2d at 865. During trial, BASF's regulatory and marketing experts and management conceded that the EPA and state herbicide regulatory process has no relation to whether a company deceptively and fraudulently markets and sells a product:

BASF's regulatory expert – Daniel Barolo

Q. And the same thing would be true of ***a company who went through all the process of registering a crop with both the EPA and***

("split and subset labeling"). The EPA also allows companies to register alternate brand names for a registered product. FIFRA § 3(e). The EPA does not ascertain the reasons why companies choose to split or subset label their pesticides, beyond a demonstration that a split or subset label "*would not significantly increase the risk of any unreasonable adverse effect on the environment.*" 40 C.F.R. § 152.113(b) (emphasis added). Simply stated, the ***EPA does not address company marketing and pricing practices.***

states, they could still commit consumer fraud.

A. ***I presume they could.***

Tr.2697:7-11.

BASF's marketing expert – Dr. Dale Dahl

Q. Okay. ***So patents, consumer fraud, doesn't cover it. Registration, consumer fraud doesn't cover it. Differential pricing, consumer fraud doesn't cover it. In other words, you're not protected from committing consumer fraud.***

A. ***Right.***

Tr.3352:12-17.

BASF's management – William Wisdom

Q. And ***you will agree and tell the jury that the EPA does not concern itself with BASF's marketing practices, does it?***

A. ***That's correct.***

Q. ***But consumer fraud laws do, don't they?***

A. ***Yes, sir.***

Q. ***The EPA registration process that we have been talking about does not concern market[ing]; right?***

A. ***That's correct.***

Tr.1017:7-15.

E. FIFRA Preemption In A Nutshell

1. *Peterson* – A "Fraudulent Marketing" Case – Has Nothing To Do With FIFRA Preemption Disputes Involving Injury To People And Crops

Farmers have never challenged the adequacy of the safety warnings on the Poast and Poast Plus herbicide product labels (failure-to-warn), phytotoxicity of the product (whether it harms the crop), or efficacy of the product (whether it works as intended). Nor do Farmers

claim that BASF misled the EPA. Farmers challenge the deceptive marketing of the products to consumers. BASF misuses cases that have no relationship to Farmers' fraudulent marketing claims:

Failure-To-Warn Cases

- *Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir.), *cert. denied*, 537 U.S. 949 (2002) (*injury* to horse rider caused by use of insecticide on horse);
- *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) (*injury* to workers caused by pesticide);

Phytotoxicity Cases

- *Dow Agrosciences LLC v. Bates*, 332 F.3d 323 (5th Cir. 2003), *cert. granted*, 2004 WL 1431958 (U.S. June 28, 2004) (No. 03-388) (*injury* to peanut crop caused by herbicide);
- *Etcheverry v. Tri-Ag Serv., Inc.*, 93 Cal. Rptr. 2d 36 (Cal. 2000) (*injury* to walnut crop caused by insecticide);
- *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995) (*injury* to cotton crop caused by herbicide);

Fraud On EPA Cases

- *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (fraud by company in registration submissions to EPA).

BASF's misuse of cases was easily addressed by the Minnesota appellate courts. *Peterson III*, 675 N.W.2d at 70 (consumer fraud claims based on "fraudulent marketing techniques" rather than label representations are not preempted); *Peterson II*, 657 N.W.2d at 865 (emphasis in original) ("*even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud").

2. Although Courts Debate Whether *Failure-To-Warn* And *Phytotoxicity* Cases Are Preempted, Informed Courts Agree *Efficacy* Cases Are Not Preempted, And All Courts Agree That State Consumer Fraud Claims Of *Deceptive Marketing Schemes* Are Never Preempted

a. Failure-To-Warn; *Unintended Safety Consequences* For People And Environment Evaluated By EPA – Maybe Preempted

Courts generally hold that that "failure to warn" product liability cases for unintended safety consequences are preempted by FIFRA – a health and safety law governing pesticide application and registration decisions as they relate to the health and safety of the pesticide for the environment. *See, e.g., Etcheverry v. TRI-AG Service, Inc.*, 993 P.2d 366 (Cal. 2000) (failure-to-warn and phytotoxicity claims preempted; efficacy claims not preempted); *Hart v. Bayer Corp.*, 199 F.3d 239, 245-46 (5th Cir. 2000) (efficacy claims not preempted).

b. Phytotoxicity; *Company Certifies Safety For Intended Use* In EPA Registration Submission – Maybe Not Preempted

A more vexing question is whether phytotoxicity cases, like *Bates*, should be preempted. Should farmers be barred from suing a profiteering company that sells a product that harms the crop – an intended use certified by the company to the EPA as safe? *See* Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption Of State Tort Remedies*, 77 B.U.L.Rev. 559, 561 (1997) (corporations should not be allowed to turn statutes from regulatory swords into private shields).

c. Efficacy; *Product Does Not Work* – Not Preempted

Courts virtually all agree that efficacy cases should not be preempted. *See, e.g., Etcheverry*, 993 P.2d 366 (Cal. 2000)

(efficacy claims not preempted); *Hart*, 199 F.3d at 245-46 (efficacy claims not preempted). A company should not be immunized by a federal health and safety law against claims that its product does not work, e.g., a herbicide that ***does not kill target weeds***.

d. *Fraudulent Marketing Schemes* – Absolutely Never Preempted

All courts agree that "fraudulent marketing" claims like *Peterson* – which fully implicate the historic police power of the State to protect innocent consumers from fraud – should never be preempted. *See, e.g., Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 613-14 (1991) (FIFRA is not intended to usurp the historic police powers of the State).

3. Jury Verdict Does Not Require BASF To Change Product Labels – Jury Verdict Only Tells BASF To Stop Fraudulent Marketing Schemes

Farmers have never challenged the accuracy or adequacy of the Poast and Poast Plus product labels. *Peterson III*, 675 N.W.2d at 70 (emphasis in original and added), citing *Peterson II*, 657 N.W.2d at 865 (Farmers' claims are "***not based on BASF's labels but rather on fraudulent marketing techniques***."). The jury verdict does not prohibit companies like BASF from container-labeling a product for fewer crops than registered by the EPA, or branding (naming) one product as different products for sale. It only requires companies like BASF to be honest in their communications to consumers.

IV. CONCLUSION

The EPA declared that BASF's fraudulent "marketing" scheme was not in the EPA's purview and not preempted. The Minnesota appellate courts and common sense declare likewise. Farmers ask this Court to promptly deny BASF's frivolous petition.

Respectfully submitted,

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No. 04-81

In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Product Liability Advisory Council, Inc. ("PLAC") moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for the respondents has withheld consent.

PLAC is a non-profit corporation with 129 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of products such as automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals, and medical devices. A list of PLAC's current corporate membership is included in an appendix to the accompanying brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted hundreds of *amicus* briefs in the state and federal appellate courts, including in many of this Court's cases involving issues of federal preemption. See, *e.g.*, *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000); *United States* v. *Locke*, 529 U.S. 89 (2000); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996). In addition, PLAC filed *amicus* briefs in this case in both the Minnesota Supreme Court and the Minnesota Court of Appeals. Because many of PLAC's members manufacture products that are subject to preemptive federal requirements, they have a vital interest in the development of the law of preemption and the proper resolution of this case.

PLAC's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

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BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

1. The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, vests the Environmental Protection Agency ("EPA") with broad authority to regulate the labeling and packaging of pesticides sold in the United States. EPA has exercised that authority by, among other things, promulgating detailed specifications for pesticide labeling. See, *e.g.*, 40 C.F.R. § 156.10.

In enacting FIFRA, Congress took steps to ensure that EPA's authority over pesticide labeling and packaging was exclusive. Toward that end, Congress included in FIFRA a preemption clause – aptly titled "uniformity" – that expressly bars the States from imposing on federally registered pesticides "*any* requirements for labeling or packaging" that are "in addition to or different from those required under" federal law. 7 U.S.C. § 136v(b) (emphasis added); see also *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 615 (1991) (explaining that labeling "fall[s] within an area that FIFRA's 'program' preempts"). Congress intended Section 136v(b) "to *completely preempt* state authority in regard to labeling and packaging." H.R. Rep. No. 92-511, at 16 (1971) (emphasis added).

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[1] Pursuant to Rule 37.6 of the Rules of this Court, PLAC states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

In contrast to its treatment of labeling, FIFRA expressly preserves a role for the States in regulating the "sale or use" of pesticides (although States may not "permit any sale or use" that is "prohibited by" federal law). 7 U.S.C. § 136v(a). Under FIFRA, a pesticide (including a herbicide) may not be distributed or used in the United States unless it first has been registered by EPA. *Id.* § 136a(a). But the States may (and all do) require separate registration (*i.e.*, approval) of pesticides, and any State may refuse to permit the sale or use of an EPA-registered pesticide within its borders. *Id.* § 136v(a); Pet. 2.

2. In the decision below, the Minnesota Supreme Court upheld a $52 million judgment against petitioner BASF Corporation, a manufacturer of pesticides, in a nationwide class action brought under the New Jersey Consumer Fraud Act ("NJCFA"), N.J. STAT. ANN. §§ 56:8-1 to 56:8-116 (West 2002). Respondents are a class of all persons in the United States who purchased Poast, a herbicide made by BASF, between January 1, 1992, and December 31, 1996, for use on their crops (with the exception of certain North Dakota residents). Pet. ii. During the class period, Poast was more expensive than Poast Plus, another herbicide manufactured by BASF. The price differential between Poast and Poast Plus was the basis for respondents' damages claims.

Over objection, a Minnesota jury was permitted to rely on two of BASF's labeling decisions concerning Poast in concluding that the company had committed an "unconscionable commercial practice" (N.J. STAT. ANN. § 56:8-2 (West 2002)). First, respondents claimed that it was "unconscionable" to put different names and labels on Poast and Poast Plus because the two herbicides have the same active ingredient. See Pet. 13. Yet federal regulations *require* distinct product labeling for pesticides with the same active ingredients if their chemical formulae differ as much as Poast and Poast Plus do. See 40 C.F.R. §§ 152.15, 152.43, 158.175; Pet. 3, 4, 16. Second, respondents claimed it was "unconscionable" to label and market Poast Plus, which was less expensive than Poast, for

only a subset of its EPA-approved uses. See Pet. 12 & nn.3-4. Yet federal regulations *expressly authorize* pesticide manufacturers to engage in this practice (known as "subset labeling"). See 40 C.F.R. § 152.130(b); 53 Fed. Reg. 15952, 15957 (May 7, 1988).

The Minnesota Supreme Court rejected BASF's argument that respondents' NJCFA claims are preempted by federal law. Pet. App. 16a-21a. The court acknowledged that it is "well established that FIFRA preempts state actions relating to labeling and packaging," and that "evidence was presented at trial based on statements derived from the Poast and Poast Plus labels." *Id.* at 18a, 20a. But the court reasoned that "the farmers' claims of unconscionable commercial conduct" were also based on "statements and actions that *went beyond the label*" (including statements made in BASF's advertisements). *Id.* at 20a (emphasis added). It also rejected BASF's implied-preemption argument on the ground that respondents' "consumer fraud claim was not based on Poast and Poast Plus being the same product, but rather on BASF * * * making misrepresentations about the products." *Id.* at 17a. Those "misrepresentations," however, included statements – such as that Poast Plus could not be used for minor crops – that were consistent with the Poast Plus labeling. Pet. 12 & n.3.

ARGUMENT

In the decision below, the Minnesota Supreme Court has disregarded Congress's clear command and created a large loophole in the uniform federal regulatory scheme that governs pesticide labeling. The court upheld a $52 million judgment whose "liability-creating premise[]" (*Medtronic* v. *Lohr*, 518 U.S. 470, 508 (1996) (opinion of Breyer, J.)) was that petitioner BASF committed fraud and unconscionable conduct under New Jersey law when it marketed a pesticide with labeling that was in full compliance with requirements imposed under federal law. By so doing, the court has sanctioned exactly what Congress sought to avoid by enacting FIFRA's express preemption clause. It has permitted a State to impose divergent or addition-

al requirements relating to the labeling of an EPA-registered pesticide. The Minnesota Supreme Court's suggestions that the respondents' claims do not really call into question the adequacy of the Poast Plus labeling, and would not spur BASF to change that labeling, are wrong and reflect a stunning disregard for economic and commercial realities. That the Minnesota Supreme Court sanctioned such an incursion on FIFRA's uniform regulatory scheme in a *nationwide class action* applying New Jersey law to farmers across the United States only heightens the need for this Court's review to preserve the integrity and uniformity of the federal regulatory scheme.

The Minnesota Supreme Court's rulings on both express and implied preemption warrant further review. On express preemption, the Minnesota Supreme Court held, in square conflict with the decisions of many lower courts, that FIFRA's express preemption clause can be avoided by any plaintiff who purports to rely on "statements and actions" of a manufacturer that go "beyond the label" (such as product advertisements). Pet. App. 18a, 20a. In addition, as we explain below, the decision raises an issue of broader importance in the law of federal preemption (including under other, similarly worded federal statutes) on which the lower courts have divided sharply.

The Minnesota Supreme Court's *implied*-preemption ruling also warrants this Court's review. According to respondents, BASF violated New Jersey law because it engaged in a "scheme to exploit [ ] farmers" who bought Poast and Poast Plus, two similar but not identical pesticides. Pet. App. 17a. The root of the alleged exploitation was BASF's decision to register Poast Plus as a product distinct from Poast, a step *compelled* by EPA regulations, and to label Poast Plus for use on only a subset of the crops for which EPA had approved it, an option that EPA regulations explicitly guarantee. By imposing massive state-law liability for doing what federal law *requires*, and for exercising an option that federal law expressly authorizes, the Minnesota

courts have reached a result incompatible with this Court's decisions, and thus deserving of review.[2]

I. THE LOWER COURT'S EXPRESS-PREEMPTION HOLDING WARRANTS REVIEW

FIFRA's express preemption clause provides that a State "shall not impose or continue in effect *any* requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b) (emphasis added). The lower courts have generally rejected plaintiffs' efforts to evade this congressional command through artful pleading. Thus, in response to efforts to repackage failure-to-warn or fraud claims that directly challenge the adequacy of pesticide labeling as warranty or other types of legal claims, most courts have ruled that FIFRA preempts *all* state-law claims that "result[] in the imposition of additional or different labeling requirements * * * *regardless* of the *guise* under which the claim is presented." *Netland* v. *Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir.) (emphasis added), cert. denied, 537 U.S. 949 (2002). Equally unavailing, in the vast majority of cases, have been plaintiffs' arguments that failure-to-warn claims escape preemption under 7 U.S.C. § 136v(b) because the manufacturer could have, or should have, provided warnings *outside* of the product "labeling" (as, for example, in advertising).

This body of decisional law makes eminent sense. Warnings, after all, can be communicated on a product's label, in point-of-sale signs, in print or television advertising, in oral representations, and in countless other ways. If federal law requires a warning on the product's labeling, and state law re-

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[2] PLAC agrees with petitioner BASF that the First Amendment issue raised in the petition for certiorari also warrants this Court's review. Especially troubling (and perplexing) is the Minnesota courts' imposition of state-law treble-damages liability on a manufacturer for truthfully reporting to responsible government authorities the illegal actions of third parties in connection with the use of the manufacturer's product. To meet space limitations and avoid redundant briefing, however this brief focuses on the preemption question.

quires a different or additional warning *outside* of the labeling, the necessary premise of the state law is that the federally mandated warnings are inadequate. See, *e.g.*, *Papas* v. *Upjohn Co.*, 985 F.2d 516, 519 (11th Cir.) ("any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff *necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging*") (emphasis added), cert. denied, 510 U.S. 913 (1993).

Any approach that allows artful pleading, moreover, would allow FIFRA's preemption clause to be easily circumvented. Preemption is an affirmative defense that is ordinarily resolved on purely legal grounds at the threshold of litigation (on a motion for dismissal or for summary judgment). Under the approach adopted by the Minnesota Supreme Court, however, any plaintiff could avoid preemption under FIFRA with the stroke of a pen merely by alleging in the complaint that a manufacturer should have provided warnings outside of the pesticide labeling. That cannot be right. Cf. *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001) (rejecting argument, equally susceptible to being used to circumvent express preemption, that federal requirements are not preemptive because they were procured by a "fraud" on the agency).

In rejecting BASF's arguments for express preemption, the Minnesota Supreme Court ignored these common-sense teachings of many other courts. It did pay lip service to the "well established" principle that FIFRA preempts not only "state actions relating to labeling and packaging" but also "state law claims *premised* on inadequate labeling or failure to warn, which result[] in the imposition of additional or different labeling requirements." Pet. App. 18a (internal quotation marks omitted). But the Minnesota Supreme Court misunderstood and misapplied that principle when it failed to recognize that a state-law claim can be predicated on the *inadequacy* of FIFRA-compliant labeling without in any way challenging the literal accuracy of statements made in the labeling. Thus, the Minnesota Supreme Court thought it fatal to BASF's preemption

defense that "the farmers here were not asserting that BASF's registration and container labels were false or misleading," but instead were claiming that, "*even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops." Pet. App. 19a.

That analysis is wrong at every turn. First, as BASF demonstrates (Pet. 12 & nn.3-4), respondents *did* repeatedly assert that BASF's pesticide labeling was untruthful, inaccurate, and "deceptive." See Pet. 12 & nn. 3-4. Second, and more fundamentally, a plaintiff's state-law claim can challenge the adequacy of product labeling without asserting that any statement in the labeling is literally untrue. For example, a failure-to-warn claim alleging that the manufacturer should have alerted farmers to a hazard that was unmentioned in the labeling would not necessarily challenge the literal accuracy of the warnings that *are* included in the labeling. It plainly would, however, challenge the *adequacy* of those warnings. Third, the Minnesota Supreme Court ignored the fact that BASF's alleged "misrepresentations"– including that Poast Plus could not be used for minor crops – were entirely consistent with the Poast Plus labeling. And respondents' claims would not exist had BASF labeled Poast Plus differently – for use on *all* crops for which EPA had approved it.

The Minnesota Supreme Court also parted ways with the great weight of authority when it rejected BASF's express-preemption argument on the ground that "the farmers' claims of unconscionable commercial conduct" were based on "statements and actions that went beyond the label." Pet. App. 18a, 20a. This aspect of the court's holding warrants review because it conflicts with many other decisions involving FIFRA and also with decisions involving other federal statutes that similarly preempt state "labeling" requirements.

A. The Minnesota Supreme Court's Decision Conflicts With The Decisions Of Other Courts Interpreting FIFRA's Express Preemption Clause

The "overwhelming majority of courts" – both state and federal – have held that state-law claims for failure to warn are expressly preempted by FIFRA, even when such warnings could be communicated through means other than the product labeling. *Eyl* v. *Ciba-Geigy Corp.*, 650 N.W.2d 744, 754 (Neb. 2002), cert. denied, 123 S. Ct. 2642 (2003); *id.* at 754-59 (discussing case law); see also, *e.g.*, *King* v. *E.I. Dupont De Nemours & Co.*, 996 F.2d 1346, 1349-50 (1st Cir.), cert. dismissed, 510 U.S. 985 (1993); *Worm* v. *American Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir. 1993); *MacDonald* v. *Monsanto Co.*, 27 F.3d 1021, 1024-25 (5th Cir. 1994); *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 369-71 & n.4 (7th Cir. 1993); *Bice* v. *Leslie's Poolmart, Inc.*, 39 F.3d 887, 888 (8th Cir. 1994); *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995); *Arkansas-Platte & Gulf Partnership* v. *Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), cert. denied, 510 U.S. 813 (1993); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 519 (11th Cir.), cert. denied, 510 U.S. 913 (1993); *Goodwin* v. *Bacon*, 896 P.2d 673, 681 (Wash. 1995); *Jenkins* v. *Amchem Prods., Inc.*, 886 P.2d 869, 881-82 (Kan. 1994), cert. denied, 516 U.S. 820 (1995).

The Eleventh Circuit's decision in *Papas* is illustrative. There, the court of appeals stated:

> Appellants * * * contend that because the language of 136v refers only to "labeling or packaging," the section does not pre-empt failure to warn claims based on *point-of-sale signs, consumer notices, or other informational materials that are "unrelated" to labeling and packaging.* * * * If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends. Plaintiffs may not interfere with the FIFRA scheme by bringing a

> common law action alleging the inadequacy of, for example, point-of-sale signs.

985 F.2d at 519 (emphasis added). Without such a rule, FIFRA preemption could be easily circumvented. Indeed, a failure-to-warn claim would escape preemption if the plaintiff merely alleged that the warning should have been provided through means other than the product's labeling. That allegation could be made in any case. Thus, as the Eleventh Circuit (and many other courts) understood but the Minnesota Supreme Court did not, FIFRA preemption could be defeated by artful pleading on the plaintiff's part.

In holding that there is no preemption under FIFRA because respondents' claims were based in part on "statements and actions that went beyond the label" (Pet. App. 18a, 20a), the Minnesota Supreme Court placed itself in conflict with the foregoing decisions. At the same time, however, its willingness to allow FIFRA's express preemption clause to be circumvented by artful pleading finds support in the decisions of a small minority of courts that have similarly ruled that claims based on statements made outside of the product "labeling" are not preempted by Section 136v(b). See, *e.g.*, *Burke* v. *Dow Chemical Co.*, 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992); *D-Con Co.* v. *Allenby*, 728 F. Supp. 605, 607 (N.D. Cal. 1989) ("[m]any warning methods, including the point-of-sale signs * * * may satisfy the requirements of California without infringing on federal supremacy in the area of pesticide labeling"); *Malone* v. *American Cyanamid Co.*, 649 N.E.2d 493, 498-99 (Ill. Ct. App.), appeal denied, 657 N.E.2d 624 (Ill. 1995); *Gorton* v. *American Cyanamid Co.*, 533 N.W.2d 746, 755-56 (Wis. 1995), cert. denied, 516 U.S. 1067 (1996).

The tension between these two lines of cases has been widely acknowledged. See, *e.g.*, *Kuiper* v. *American Cyanamid Co.*, 913 F. Supp. 1236, 1239-45 (E.D. Wis. 1996) (reviewing conflict and expressly disagreeing with *Burke* and *Malone*), aff'd, 131 F.3d 656 (7th Cir. 1997), cert. denied, 523 U.S. 1137 (1998); *Wright* v. *Dow Chemical U.S.A.*, 845 F. Supp. 503, 508

n.2, 510 (M.D. Tenn. 1993) (disagreeing with *Burke*); *DerGazarian* v. *Dow Chemical Co.*, 836 F. Supp. 1429, 1433-47 & nn.1-2 (W.D. Ark. 1993) (extensively reviewing the "split of authority"); *Goodwin*, 896 P.2d at 681 (noting conflict and agreeing with "the majority of courts" that have "refus[ed] to distinguish non-label failure to warn"); *Jenkins*, 886 P.2d at 881-82 (same).

Moreover, the First Circuit has described the issue whether FIFRA preempts state-law claims for failure to warn outside of product labeling as a "potentially vexing problem," explaining:

> [O]ne can imagine claims based on what was said or not said during conversations, in correspondence, or in point of sales signs or the absence of such signs. Whether and to what extent these kinds of claims should be preempted depends on a reading of section 136v and related judgments. The answers are far from clear.

Grenier v. *Vermont Log Buildings, Inc.*, 96 F.3d 559, 564 (1st Cir. 1996).

The disagreement in the lower courts persists and plainly is in need of resolution by this Court. Respondents' consumer fraud claims would be expressly preempted in the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits, but not in the Minnesota Supreme Court and in a handful of other jurisdictions. Moreover, the Minnesota Supreme Court's adoption of a rule of law that conflicts with the approach of the Eighth Circuit, see *Bice* v. *Leslie's Poolmart, Inc.*, *supra*, is especially troubling. When a decision of the highest court of a State conflicts with a decision of the federal circuit in which that State is located, this Court has often granted review to address the special problem of forum shopping created by that circumstance. See, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 409 (1994) (conflict between Utah Supreme Court and Tenth Circuit); *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992) (Ninth Circuit and California state courts); *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985). Review of the express-preemption issue in this case is warranted to address this pervasive conflict in the lower courts.

B. The Same Issue Frequently Arises Under Other Preemption Clauses, With Inconsistent Results

Although the Minnesota Supreme Court's evisceration of FIFRA's express preemption clause is reason enough for this Court to grant review, the effects of the decision below are likely to be felt far beyond the context of pesticide labeling. The reason is simple: many other provisions in the United States Code specifically preempt nonidentical state "requirements" that relate to product "labeling." Those include, for example, the Federal Hazardous Substances Act ("FHSA"), which Congress enacted to provide nationally uniform requirements for cautionary labeling of hazardous substances intended for household use. See *Moss* v. *Parks Corp.*, 985 F.2d 736, 739 (4th Cir.), cert. denied, 509 U.S. 906 (1993). The FHSA's express preemption clause declares that "no State * * * may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging * * * unless such cautionary labeling requirement is identical to the [FHSA] labeling requirement." 15 U.S.C. § 1261 note. Some courts have concluded that, because of similarities in the statutory text, the scopes of FHSA and FIFRA preemption are identical. See *Chemical Specialties Mfrs. Ass'n, Inc.* v. *Allenby*, 958 F.2d 941, 945 (9th Cir.) ("The preemption issues arising under FHSA are identical to those arising under FIFRA."), cert. denied, 506 U.S. 825 (1992).

Moreover, when Congress enacted the current version of the FHSA preemption clause in 1976, it did so with the avowed purpose of creating "a uniform Federal preemption clause" for the FHSA and three other federal preemption provisions that include language similar to the FHSA: the Consumer Product Safety Act (15 U.S.C. § 2075(a) (preempting, among other things, nonidentical state standards relating to the "packaging" or "labeling" of consumer products)); the Poison Prevention Packaging Act (*id.* § 1476(a)) (same for state requirements relating to "special packaging" of certain household products); and the Flammable Fabrics Act (*id.* § 1203(a)). See S. Rep. No. 94-251, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S.C.C.A.N.

993, 996; H.R. Conf. Rep. No. 94-1022, 94th Cong., 2d Sess. 27-28, *reprinted in* 1977 U.S.C.C.A.N. 1030. In view of Congress's stated objective that these four provisions be co-extensive, any interpretation of the FIFRA (and FHSA) preemption clause is likely to be controlling in cases involving these other statutes as well.

In addition, at least 10 other federal statutes expressly preempt state "requirements" relating to product "labeling." Those include: (1) the Child Safety Protection Act, 15 U.S.C. § 1278 note (preempting state "requirement[s] relating to cautionary labeling" for toys, games, balloons, marbles and other products that present choking hazards to children); (2) the Fair Packaging and Labeling Act, *id.* § 1461 (preempting state laws governing "labeling" of certain consumer products); (3) the Magnuson-Moss Warranty Act, *id.* § 2311(c) (preempting certain state "requirement[s]" that relate to warranties in "labeling"); (4) the National Education and Labeling Act, 21 U.S.C. § 343-1(a) (preempting certain state "requirements" relating to food "labeling"); (5) the Poultry Products Inspection Act, *id.* § 467e (preempting certain state "requirements" relating to poultry "labeling"); (6) the Federal Meat Inspection Act, *id.* § 678 (preempting certain state "requirements" relating to meat "labeling"); (7) the Egg Product Inspection Act, *id.* § 1052 (preempting certain state "requirements" relating to egg product "labeling"); and (8) the Mercury-Containing and Rechargeable Battery Act, *id.* § 14322(e) (preempting certain state "labeling requirement[s]" for rechargeable batteries and rechargeable consumer products).[3]

Each of these provisions potentially gives rise to the same issue that is presented in this case: whether a federal law that preempts state "labeling" requirements permits a State to

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[3] See also 42 U.S.C. § 6297(a) (preempting certain state "labeling requirements" relating to energy consumption or water use with respect to certain products); *id.* § 6363(e)(1) (preempting certain state labeling requirements concerning containers of recycled oil).

impose requirements based on "statements and actions that went beyond the label" (including statements in the manufacturer's advertisements). Pet. App. 18a, 20a. That issue has in fact arisen under a variety of these other statutes, with mixed results.

The cases decided under the FHSA are illustrative. As under FIFRA, the lower courts are divided over whether the FHSA preempts state laws that require statements outside of the product "labeling." The great weight of judicial authority holds that state-law actions are preempted under FHSA if they necessarily imply that the federal labeling requirements are inadequate. See *Comeaux* v. *National Tea Co.*, 81 F.3d 42, 43 (5th Cir. 1996) ("The FHSA preempts any state law warning requirements other than those imposed by the FHSA and its implementing regulations."); *Moss* v. *Parks Corp.*, 985 F.2d 736, 740 (4th Cir. 1993) (same). See also *Lee* v. *Boyle-Midway Household Prods., Inc.*, 792 F. Supp. 1001, 1007-09 (W.D. Pa. 1992); *Salazar* v. *Whink Prods. Co.*, 881 P.2d 431 (Colo. Ct. App. 1994), cert. denied, 514 U.S. 1004 (1995); *Busch* v. *Graphic Color Corp.*, 662 N.E.2d 397, 405-06 (Ill.), cert. denied, 519 U.S. 810 (1996); *State ex rel. Jones Chemicals, Inc.* v. *Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994); *Canty* v. *Ever-Last Supply Co.*, 685 A.2d 1365, 1374-75 (N.J. Super. Ct. 1996); *Beyrle* v. *Finneron*, 645 N.Y.S.2d 192, 193 (N.Y. App. Div. 1996); *Wallace* v. *Parks Corp.*, 629 N.Y.S.2d 570, 573-74 (N.Y. App. Div. 1995); *Jenkins* v. *James B. Day & Co.*, 634 N.E.2d 998 (Ohio 1994).

The Ninth Circuit has taken a different view, however. In *Chemical Specialties Mfrs. Ass'n, Inc.* v *Allenby*, *supra*, the court of appeals held that FHSA preemption does *not* extend to extra-labeling warning requirements, reasoning that (for example) a state point-of-sale requirement is not a "labeling requirement" because it does not require changing the label itself. 958 F.2d at 945. Other courts have agreed with *Allenby*. See, *e.g.*, *People ex rel. Lundgren* v. *Cotter & Co.*, 53 Cal. App. 4th 1373, 1379-80, 1387-89 (1st Dist.), cert. denied, 522 U.S. 1015 (1997). In these cases, a manufacturer's failure to provide information created liability even though the relevant federal

labeling statute deemed the same information unnecessary.[4] These decisions are consistent with what the Minnesota Supreme Court did in this case.

Finally, the same issue arises even under express preemption clauses that do *not* exclusively target state requirements relating to product "labeling." For example, the preemption clause of the Medical Device Amendments ("MDA") broadly declares: "[N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use *any* requirement – (1) which is different from, or in addition to, *any* requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter." 21 U.S.C. § 360k(a) (emphasis added). See generally *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996). But the fact that the MDA's preemption provision is not limited to requirements relating to "labeling" has not prevented plaintiffs from raising this argument. See, *e.g.*, *Baker* v. *Medtronic, Inc.*, 2002 WL 485013, at *8 (S.D. Ohio Mar. 28, 2002); Appellant's Reply Brief, *Horn* v. *Thoratec Corp.*, No. 02-4597, at 11-12 (3d Cir.) (filed June 18, 2003) <available http://www.citizen.org/documents/HornReply3.617.pdf>.

Notably, in several recent *amicus curiae* briefs the United States government has endorsed the common-sense position adopted by the overwhelming majority of courts in response to the efforts of plaintiffs to circumvent express preemption

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[4] Preemption issues arise with frequency under many of the other statutes that nullify state "labeling" requirements. See, *e.g.*, *Moe* v. *MTD Prods., Inc.*, 73 F.3d 179, 182-83 (8th Cir. 1995) (holding state common law failure-to-warn claim based on deficiency in federal labeling preempted under Consumer Product Safety Act, 15 U.S.C. § 2075(a)); *Cortez* v. *MTD Prods., Inc.*, 927 F. Supp. 386, 391 (N.D. Cal. 1996) (same) ("permitting plaintiff to recover on his failure to warn theory would upset the careful balancing of interests that Congress, through the Consumer Product Safety Commission, sought to achieve when it prescribed the warning label regulations" for lawn mowers).

clauses through artful pleading. Thus, in his brief at the petition stage in *Dow Agrosciences LLC* v. *Bates*, No. 03-388, the Solicitor General made clear that in his view FIFRA "broadly preempts state-law causes of action *relating to* product labeling," including any claims that "would, in effect, require [a manufacturer] to add or subtract from the pesticide label in order to avoid liability." No. 03-388 U.S. Br. as *Amicus Curiae*, at 17 & n.6 (emphasis added) <available at http://www.usdoj.gov/osg/briefs/2003/2pet/6invit/2003-0388.pet.ami.inv.pdf>; accord *id.* at 11 (FIFRA "generally preempts" state tort actions that are "label-related"). Similarly, in *Horn* v. *Thoratec Corp.*, 376 F.3d 163 (3d Cir. 2004), the United States filed an *amicus* brief successfully urging the court of appeals to affirm the dismissal of all of the plaintiff's state-law tort claims, including those premised on an "outside-the labeling" theory, as expressly preempted by the MDA. See 3d Cir. No. 02-4597 U.S. Br. as *Amicus Curiae*, 2004 WL 1143720, at *5, *30-31 (filed May 14, 2004).

As the foregoing makes clear, this Court's review of the Minnesota Supreme Court's ruling on express preemption would clarify an important issue of preemption law that arises not only under FIFRA but also under a wide array of other statutory preemption provisions. For that reason, this Court should grant review of the preemption issue raised in this case.

II. THE LOWER COURT'S IMPLIED-PREEMPTION HOLDING ALSO WARRANTS REVIEW

Congress's preemptive intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Thus, even if it falls outside of the reach an express preemption clause, a state law may nevertheless be preempted if it conflicts with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 31 (1996) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). The Minnesota Supreme Court's

rejection of BASF's *implied* preemption arguments independently deserves this Court's review. As we explain below, the lower court's conclusion that the multi-million-dollar judgment in this case is compatible with federal law is squarely at odds with this Court's teachings.

Respondents' claims are impliedly preempted in at least two ways. *First*, their allegation that BASF engaged in a "scheme to exploit the farmers" directly challenges BASF's federally guaranteed choice to label Poast Plus for only a subset of its registered uses. *Second*, respondents' claim that BASF violated New Jersey law by "advertis[ing] and market[ing] the[] equivalent [Poast and Poast Plus] formulations * * * as two separate products," Tr. 2528, conflicts with federal regulations that *mandated* the separate labeling of the two products.

A. State Law May Not Impose Treble-Damages Liability On A Manufacturer For Exercising A Choice Granted By Federal Law

Respondents' theory of liability was that BASF "unconscionably exploited the regulatory standards and overtly deceived and lied to farmers to conceal the fact that the less expensive Poast Plus was registered with the EPA for the same crops as Poast." Pet. App. 60a. Proving "deceit" was necessary for a recovery, for respondents' theory of damages was that they "lost the opportunity to protest, petition for relief from government agencies, litigate, or simply make an intelligent, informed decision on whether to refuse to buy the more expensive Poast." *Id.* at 43a. At trial, some of respondents were far more blunt, arguing that it was "unfair, unethical, [and] immoral" for BASF not to label Poast Plus for minor crops when "both [Poast and Poast Plus] were registered by EPA." Tr. 1169-1170.

This theory of liability is impliedly preempted by federal law. BASF's decision to label Poast Plus for only a subset of the crops for which it was EPA-approved was an option explicitly authorized by federal regulations. See 40 C.F.R. § 136a(a) ("A registrant may distribute or sell a product

under labeling bearing any subset of the approved directions for use."). As explained by BASF (Pet. 4, 6, 20-21), this subset labeling option serves several salutary purposes. First, even if a pesticide has EPA's approval, its manufacturer may believe it has not been tested sufficiently on a particular crop. If subset labeling is not an option, the manufacturer might simply delay the product's release, a decision that could exacerbate the shortage of pesticides for minor crops. See EPA, *Report on Minor Uses of Pesticides*, at 3 (1996) ("minor uses are not always economically attractive to the pesticide industry"). Second, in the event a manufacturer has trouble obtaining state registration for a particular crop, subset labeling allows it to release that product for use on other, approved crops. Subset labeling also allows manufacturers greater freedom in marketing their products.

In a series of cases, this Court has made clear that a state law is impliedly preempted if it would undermine or prohibit an option granted by Congress or by a pertinent federal agency. *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 881-82 (2000); *Barnett Bank*, 517 U.S. at 31; *Fidelity Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 155 (1982). In *de la Cuesta*, this Court held that a federal law authorizing savings and loan associations to use particular "due-on-sale" clauses in loan agreements impliedly preempted a state law prohibiting such federally approved clauses. *Id.* at 156. Similarly, in *Barnett Bank*, this Court held that a federal statute guaranteeing that certain banks could "act as the agent for fire, life, or other insurance company * * * by soliciting and selling insurance" (12 U.S.C. § 92) impliedly preempted the order of a state insurance commissioner, based on a state statute, directing a bank to stop selling insurance. Because the state statute conflicted with the bank's federal authorization to sell insurance, the Court held that it was impliedly preempted.

Most recently, in *Geier*, this Court held that a federal regulation granting auto manufacturers the option of "choos[ing] among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technolo-

gies" (529 U.S. at 878) preempted a state tort action imposing liability for exercising that option in a certain way. The Court recognized that any liability predicated on a duty to install airbags would necessarily imply that choices *other than* airbags were inadequate even though they were federally sanctioned, a conclusion that in turn would "present[] an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881. It therefore held that plaintiff's tort claim was impliedly preempted.

This line of cases is dispositive here. Federal regulations allowed BASF to label Poast Plus for use on only a subset of the crops for which EPA approved it. The conclusion that BASF engaged in fraudulent marketing by failing to disclose all permissible uses of Poast Plus conflicts with this regulation because liability stems directly from the decision to use subset labeling, a decision EPA consciously left to the manufacturer. The result is especially perverse in this case because, as the petition notes (at 5), BASF's decision not to seek state registration for Poast Plus for minor crops was based on the insistence of company scientists that additional testing be conducted prior to marketing the product for those uses in order to ensure safety.

In rejecting BASF's implied preemption argument, the Minnesota Supreme Court reasoned that liability was imposed on BASF based not on the company's choice to use subset labeling, but rather on its misleading statements regarding Poast Plus's registration. The lower court pointed out that respondents relied on the fact that BASF advertised Poast as the "only" post-emergent grass herbicide registered for use on minor crops, even though EPA had also approved the cheaper Poast Plus for that use. See Pet. 18 (explaining why BASF's statement was, in fact, truthful in light of lack of state registration). But BASF could not have advertised its product for uses as to which federal, but not state registration, had been obtained without running afoul of the federal prohibition against the promotion of off-label uses. See 7 U.S.C. § 136j(a)(1)(B). It is clear in any event that BASF could have avoided liability under respondents' theory only by relinquishing its federally con-

ferred right to engage in subset labeling and seeking state registration for all uses in every state. If that were required to avoid liability under state law, however, the federal right to engage in subset labeling would be a nullity.

The Minnesota Supreme Court, however, was not content merely to uphold the imposition of multi-million-dollar liability on BASF for exercising an option granted by federal law. The lower court turned the federal authorization on its head, by faulting BASF for electing not "to seek state registration for Poast Plus on all the crops" for which the EPA had granted registration. Pet. App. 21a. Under FIFRA, however, the manufacturer retains the freedom to decide which uses to seek registration for at the federal and state level. See Pet. 20. There is no duty to seek marketing approval for a product. The Minnesota Supreme Court's suggestion that state law imposes such a duty seriously interferes with the delicate balance of objectives that Congress sought to achieve in enacting FIFRA. See *Buckman*, 531 U.S. at 347-53; Pet. 19-22.

B. State Law May Not Impose Treble-Damages Liability On A Manufacturer For Obeying The Requirements Of Federal Law

Respondents' claims under the NJCFA were also predicated on the assertion that BASF committed "unconscionable conduct" when it misrepresented that Poast and Poast Plus were different products. But BASF's decision to give Poast and Poast Plus distinct names and labels was *compelled* by federal law. If federal regulations compel an action that state law punishes, the state law must give way. See *United States* v. *Locke*, 529 U.S. 89, 109 (2000) ("conflict preemption * * * occurs when compliance with both state and federal law is impossible") (internal quotation marks omitted).

There can be no serious argument here that federal law did not require BASF to give separate names and labels to the two herbicides. EPA assigned the two products different registration numbers (D Exs. 694, 701), required BASF to submit separate toxicology data for each (see 40 C.F.R. § 158.340), and

mandated that the two products be given different names. See 40 C.F.R. § 152.43. To the extent that the jury based its finding of fraud on BASF's decision to label these "identical" products differently, such liability squarely conflicts with federal law and is impliedly preempted. Indeed, a more direct collision between state and federal law is difficult to imagine.[5]

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2004

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[5] The Minnesota Supreme Court brushed this argument aside by stating (Pet. App. 17a) that respondents had not, in fact, challenged BASF's decision to label Poast and Poast Plus differently, but instead had used that evidence merely "to illustrate what the farmers alleged was a scheme to exploit the farmers through consumer fraud." That is a distinction without a difference. Whether used as the exclusive basis for state-law liability, or merely as partial evidence of an illegal scheme, BASF's compliance with a federal mandate cannot give rise to state-law liability without violating the principle of federal supremacy embodied in the preemption doctrine and in the Supremacy Clause, U.S. CONST. Art. VI, cl. 2. In any event, as BASF demonstrates, the Minnesota Supreme Court's proffered distinction is refuted by the record. See Pet. 13.

APPENDIX

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
Altec Industries
Altria Corporate Services, Inc.
American Household, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
Aventis Pharmaceuticals, Inc.
BASF Corporation
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone/Firestone, Inc.
Briggs & Stratton Corporation
Bristol-Myers Squibb Company
Brown and Williamson Tobacco
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation

DaimlerChrysler Corporation
Dana Corporation
Deere & Company
Delphi Corporation
Diageo North America Inc.
The Dow Chemical Company
E & J Gallo Winery
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
FMC Corporation
Ford Motor Company
Freightliner LLC
General Electric Company
General Motors Corporation
GlaxoSmithKline
GLOCK, Inc.
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Harsco Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Company
Masco Corporation
Mazda (North America), Inc.
McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Porsche Cars North America, Inc.
PPG Industries, Inc.
The Procter & Gamble Company
Purdue Pharma L.P.
Putsch GmbH & Co.KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
Snap-on Incorporated
Sofamor Danek

Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
Thomas Built Buses, Inc.
TK Holdings
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive US LLC
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Zimmer, Inc.

Supreme Court, U.S.
FILED
FEB 3 - 2005
OFFICE OF THE CLERK

(9)

No. 04-81

In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Respondents have submitted a supplemental brief with an unwieldy title,[1] which they contend is "in opposition to" petitioner BASF Corporation's amicus brief in *Bates* v. *Dow Agrosciences LLC*, No. 03-388. In fact, respondents' ten-page brief almost totally ignores the substance of the amicus brief. Instead, respondents use BASF's proper amicus filing in another case as an excuse to submit a thinly-disguised sur-reply opposing the *Peterson* petition. Although we are reluctant to burden the Court with additional reading material, we think it important to respond briefly to the most significant of the many unfounded assertions in respondents' filing. BASF therefore submits this supplemental brief pursuant to Supreme Court Rule 15.8.

ARGUMENT

I. BASF'S AMICUS FILING IN *BATES* WAS PROPER

As this Court well knows, *Bates* presents important issues regarding the scope of preemption under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). As a significant manufacturer of agricultural chemicals, BASF filed an amicus brief in *Bates* to provide the Court with its perspective on some of those issues. Appropriately, BASF disclosed in the "Interest of the Amicus" section that it had pending a petition that could be affected by the Court's decision in *Bates*. It also briefly discussed the Minnesota Supreme Court's published decision in *Peterson* (along with

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[1] Respondents title their brief "Respondent Farmers' Supplemental Brief Addressing Petitioner BASF's Amicus Brief in Bates v. Dow Agrosciences (No. 03-388) Improperly Arguing Merits of Petition for a Writ in BASF v. Peterson (No. 04-81) Without Notifying Farmers' Counsel and Incredulously Complaining that Peterson Jury's 'Fraudulent Marketing' Verdict Requires BASF to Change Product Labels" ("Supp. Br.").

some 30 other cases) to illustrate the wide variety of state-law damages actions that can implicate pesticide labeling.

Respondents are not parties in *Bates* and have never sought leave to appear in that case. Accordingly, BASF was not obliged to serve them with its amicus brief. See Sup. Ct. Rule 29.3. Had they been served with the brief in *Bates*, moreover, respondents would have had no opportunity to respond to it, because the period for filing amicus briefs supporting petitioners expired *before* BASF submitted its amicus brief supporting respondent. See Sup. Ct. Rule 37.3(a). There is thus no substance to respondents' bizarre accusation (Supp. Br. 2) that BASF engaged in unfair tactics in failing to serve them with its amicus brief.

Moreover, BASF did not argue in its *Bates* amicus brief that the petition in *this* case should be granted. Having no such scruples themselves, respondents argue in their supposedly responsive filing that the Court should "promptly deny BASF's petition as frivolous." Supp. Br. 1.[2] As we discuss below, however, respondents' filing should persuade the Court to *grant* the petition. Respondents' blatant mischaracterization of their claims demonstrates the need for a strong statement from this Court that state-law actions – in whatever

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[2] This is not the first time that respondents have tried to get the last word on the merits of the petition through an unusual filing: they submitted a 14-page opposition to the three amicus briefs filed in support of the petition in this case. See Respondents (Farmers) Consolidated Objection to Motions For Leave To File Amicus Curiae Briefs By Petitioner's Coordinated Trade And Lobby Groups Who Ignore The Jury's Established Special Verdict Findings And Compelling Evidence of BASF's "System Of Deceit" (filed Oct. 4, 2004). Like respondents' most recent submission, that opposition first asserted a fictive rule violation (*id.* at 1) – stridently accusing three respected national organizations and their counsel of improprieties – and then reiterated respondents' distorted version of the facts of the case.

guise – that at their core seek to impose liability for EPA-sanctioned (or, as in this case, EPA-mandated) pesticide labeling practices are preempted.

II. RESPONDENTS' CLAIM IS BASED ON THEIR CONTENTION THAT BASF'S PESTICIDE LABELING DECEIVED AND EXPLOITED THEM

Respondents contend that they "have never challenged the accuracy or adequacy of the Poast or Poast Plus product labels." Supp. Br. 10. That statement is contradicted irrefutably by the record. Although they insist that their claim is for "fraudulent marketing," their cause of action under the New Jersey Consumer Fraud Act ("NJCFA") always has relied on a claim of deceptive and wrongful labeling.

The complaint alleges straightforwardly that BASF "falsely represented through its labeling * * * that the EPA had not approved Poast Plus for use on minor crops." Compl. ¶ 13. In other written submissions, respondents accused BASF of "'secretly' labeling Poast Plus for only a select few crops."[3] Respondents' counsel emphatically agreed with the trial court's observation that respondents were claiming that BASF's pesticides "were labeled according to the rules and regulations of EPA and that that was part of the manipulation of the system that * * * is the basis of [the] lawsuit." 10/11/01 Hearing Tr. at 111-112.

The contention that BASF's labels were deceptive was a drumbeat during the trial. When asked on direct examination what he hoped to accomplish in this lawsuit, one named plaintiff told the jury:

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[3] Plaintiffs' Consolidated Memorandum Responding to BASF's Motions to Decertify the Class and for Summary Judgment on Plaintiffs' New Jersey Consumer Fraud Act Claims, February 28, 2000, at 29; see also Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Class Certification, January 28, 1999, at 1 ("BASF engaged in * * * secret labeling").

> I'd like to send a message to the industry out there that – that *you shouldn't lie on the label.* You should tell the truth on a label that's on a – with a bottle of herbicide – a jug of herbicide.

Tr. at 1206 (emphasis added). See also, *e.g.*, Tr. 321 ("Q. What does it do to your trust of the accuracy of the label? A. It's not correct."); Tr. 588-589 ("Q. There is nothing on the Poast Plus label that is deceptive or misleading in any way. A. Yes, it is.").

In particular, respondents were aggrieved by BASF's decision to subset label Poast Plus. One respondent stated:

> I felt that we were being deceived by what we found out at that time, what was registered. The crops that were registered for Poast Plus and what was actually put on the label are two different things.

Tr. 1449. Another respondent was asked, "Is there anything on the Poast Plus label that you feel was misleading?" Tr. 1421."Yes," he answered, "[I]in light of the information I know now, that it could have been used on other crops and that the label only says the four crops." *Id.* This testimony refutes respondents' argument (Supp. Br. 4-5) that their claims arose from BASF's pesticide *pricing* and not the labeling: their complaint was that "Poast Plus was half the price of Poast, but *because of that label*, [they weren't] allowed to use Poast Plus." Tr. 1449 (emphasis added).[4]

Respondents also contended that the label was misleading because Poast and Poast Plus were labeled as different prod-

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[4] See also, *e.g.*, Tr. 572-573 ("They registered these two products to spray the same crops, but they chose only to label one of those two for the minor crops."); Tr. 1449 ("Because of that label, I wasn't allowed to use Poast Plus"); Tr. 1421 ("[Poast Plus] could have been used on other crops and * * * the label only says the four crops").

ucts when in fact they were "one product." See Supp. Br. 1 ("a company cannot exploit a federal health and safety process to market *one product* 'for different uses at different prices'") (emphasis added). For example, respondents claimed that BASF intentionally attempted to pass off "identical" pesticides as different products by listing the active ingredients in different units on the EPA-approved labels of its two pesticides. See Tr. 1179-1180. ("[T]his is an attempt to perhaps confuse the farmers"); Tr. 1239 ("I believe they did it to confuse us"). Such statements were not accidents, but were aggressively solicited by respondents' counsel as the legal and emotional core of their case. See, *e.g.*, Tr. 1421 ("Is there anything on the Poast Plus label that you feel was misleading?"); Tr. 1180 ("Do you think that this [labeling active ingredients in different units] would have been done to confuse the farmer?"); Tr. 1239 ("But what were some of the things that you thought were deceptive about the Poast Plus label?").

This record refutes respondents' *post hoc* characterization of their claim, and demonstrates the Minnesota Supreme Court's error in ruling that the claim was not preempted.

III. THIS CASE PRESENTS IMPORTANT ISSUES THAT WILL NOT BE RESOLVED BY THE *BATES* CASE

Finally addressing the *Bates* case at the end of their brief, respondents contend that the question of whether the *Bates* plaintiffs' crop-damage are preempted is "more vexing" (Supp. Br. at 9) than the preemption question presented here. According to respondents, "[a]ll courts agree" that "fraudulent marketing claims" are "[a]bsolutely [n]ever [p]reempted" (*id.* at 10) because they "fully implicate the historic police power of the State to protect innocent consumers from fraud." *Id.* Contrary to that bold yet entirely unsupported statement, however, the NJCFA claim here is even more clearly preempted than the claims in *Bates*.

First, claims such as respondents' strike more directly at the heart of FIFRA's labeling regime than the crop-damage claims at issue in *Bates*. The plaintiffs in *Bates* seek compensation for crop damage under traditional tort theories; such claims would have been available to them if FIFRA and its regulations did not exist. In contrast, respondents' claim here is closely intertwined with FIFRA: they contend that BASF manipulated *the federal labeling scheme* and failed to disclose *the federal registration status* of its products. They also contend that the *federal registration* of Poast Plus for minor crops imposed a duty on BASF to sell Poast Plus to minor crop farmers. Indeed, because the federal regulatory scheme is at the very core of respondents' claims, those claims would not exist without FIFRA. This Court has stated that there is no presumption against preemption of state-law causes of action that depend on federal statutes. See *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-348 (2001) (finding no presumption against preemption of state-law claim for fraud on the FDA because "the very subject matter of petitioner's statements were dictated by [a federal] statute's provisions").

Second, the petitioners in *Bates* argue that their claims are not preempted because EPA did not substantively review the statements about product efficacy that they contend were flawed. See *Bates* v. *Dow Agrosciences LLC*, No. 03-388, Pet. Br. at 30-37. Here, in contrast, EPA regulations explicitly *mandated* that BASF label Poast and Poast Plus as different products bearing different names (see Pet. 4-5) and affirmatively *authorized* subset labeling (see *id.* at 3) – giving explicit federal approval to the practices for which BASF was found liable under state law.

Respondents argue (Supp. Br. 5-6) that their claims should not be preempted because EPA did not *require* BASF to exclude minor crops from the Poast Plus labeling. That argument misses the point. By virtue of the subset labeling rule, federal law establishes that manufacturers are not

obliged to include all federally-registered uses on product labels. A state-law action that imposes such a requirement therefore is preempted. See *Irving* v. *Mazda Motor Corp.*, 136 F.3d 764, 769 (7th Cir. 1998) (quoting *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)) ("a state cannot impose common law damages on individuals for doing what a federal act or regulation 'authorized them to do'").[5]

Third, while the claims in *Bates* were resolved on summary judgment early in the litigation, this case has been fully litigated and tried to a jury verdict. As discussed above, there is no room for doubt here that respondents' claims rest on attacking BASF's pesticide labeling. Accordingly, this case provides an unusually good vehicle for this Court to describe the proper scope of FIFRA preemption in a state-law damages action.

Moreover, the particular issue presented by this case is important to the entire agricultural chemicals industry. In light of the decision below, members of this highly regulated industry now face the prospect that using labeling practices that have been mandated or authorized by federal law may result in liability under state law. Because this conflict be-

---

[5] Plaintiffs contend that the judgment below "does not *prohibit* companies like BASF from container-labeling a product for fewer crops than registered by the EPA, or naming one product as different products for sale." Supp. Br. at 1 (emphasis added). Under respondents' theory, however, companies that do employ subset labeling or sell different pesticide products having the same active ingredient – in full compliance with FIFRA – risk having to pay damages under state consumer fraud statutes. Such damages claims are preempted. See *Cippolone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) ("[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy").

tween federal and state law is insupportable, this Court's intervention is urgently needed.

IV. THE FIRST AMENDMENT ISSUE PRESENTED MERITS REVIEW

Of course, unlike *Bates*, this case also presents an important First Amendment issue. In none of their three filings have respondents disputed that the jury was invited to hold BASF liable, in part, on the basis of truthful statements to regulatory authorities and truthful statements in a magazine article on matters of public importance. Because the Minnesota Supreme Court's decision threatens severely to inhibit corporate speech, a grant of certiorari on that issue also is warranted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2005

No. 04-81

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OFFICE OF THE CLERK

In The
Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

RESPONDENT FARMERS' SUPPLEMENTAL BRIEF OPPOSING PETITIONER BASF'S FEBRUARY 3, 2005 SUPPLEMENTAL BRIEF WHICH PRETENDS JURY'S 2001 *"FRAUD[ULENT] MARKETING"* VERDICT NEVER OCCURRED, IGNORES EPA'S EDICT THAT BASF'S *"MARKETING"* SCHEME IS NOT PREEMPTED, CHALLENGES ESTABLISHED FACTS, AND *MISREPRESENTS THE RECORD*

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I. SUMMARY ARGUMENT

Respondents (Farmers) respectfully submit this supplemental brief opposing Petitioner's (BASF) Supplemental Brief (Supp. Br.) filed February 3, 2005. BASF pretends the unanimous jury "***fraud[ulent] marketing***" verdict and unanimous Minnesota appellate rulings affirming that verdict never occurred. BASF pretends the Environmental Protection Agency (EPA) never pronounced that BASF's fraudulent marketing scheme is not preempted – a "***company marketing decision in which EPA has no input.***"

BASF challenges established facts and fabricates an accusation – with no record support – that Farmers claimed that the federal registration of Poast Plus herbicide somehow "imposed a duty on BASF to sell Poast Plus to minor crop farmers." BASF Supp. Br., p. 6. Nothing is further from the truth. Farmers argued, and the unanimous jury on December 6, 2001 found, that BASF violated its duty of honesty in the marketing of its herbicide. Nothing about the jury verdict requires BASF to do anything other than ***honestly market its product***.

The EPA through the Solicitor General, United States, acknowledged during January 10th oral argument in *Bates v. Dow Agrosciences LLC* (No. 03-388) (*Bates*), that fraudulent marketing representations are not preempted. This Court should deny BASF's petition and end BASF's misinformation campaign. BASF's supplemental brief and *Bates* oral argument are "intervening matter[s]" satisfying Supreme Court Rule 15.8 criteria for this supplemental brief.

II. STATUS OF BASF'S JULY 16, 2004 PETITION

BASF's petition for a writ of certiorari was filed July 16, 2004 and submitted for Conference of October 29, 2004. On January 4, 2005, Farmers filed a "*Supplemental Brief Addressing [BASF's] Amicus Brief In Bates v. Dow Agrosciences (No. 03-388) Improperly Arguing Merits Of [BASF's] Petition For A Writ In BASF v. Peterson (No. 04-81) Without Notifying Farmers' Counsel And Incredulously Complaining That Peterson Jury's 'Fraudulent Marketing' Verdict Requires BASF To Change Product Labels*" (Supp. Br.). Farmers correctly informed this Court that BASF's *Bates* brief, never served on Farmers' counsel, "egregiously misstates the facts and legal issues in BASF's pending petition for a writ of certiorari in *Peterson*." Farmers' Supp. Br., p. 1. BASF's *Bates* brief was an "intervening matter" satisfying Rule 15.8 criteria for Farmers' January 4th supplemental brief.[1]

III. BASF'S MISINFORMATION CAMPAIGN

A. BASF Pretends Jury Verdict And Seven Years Of Litigation Never Occurred

BASF grasps at an isolated and out-of-context citation to a complaint drafted in 1997 and a few statements from a five-week trial in 2001. This case was tried to a 12-member jury for five-weeks in November and December, 2001, with a unanimous finding that BASF engaged in "deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's ***marketing and pricing strategies***" and a "knowing omission, suppression or

[1] Farmers January 4th supplemental brief inadvertently referenced Supreme Court Rule 18.10 as authority for the submission.

concealment of the truth" as part of its marketing scheme. RFA 1-3 (Dec. 6, 2001 Special Verdict) (emphasis added); Clerk Doc. 575.[2] The Minnesota Supreme Court observed there was evidence before the jury of BASF's ***"material [marketing] misrepresentations"*** and ***"less than candid responses"*** regarding the registration status of its products. *Peterson v. BASF Corp.*, 675 N.W.2d 57, 63-64 (Minn. 2004) (*Peterson III*) (emphasis added); *see also Peterson v. BASF Corp.*, 657 N.W.2d 853, 866 (Minn. App. 2003) (*Peterson II*) ("jury could conclude that BASF's ***marketing scheme*** and exploitation of federal regulations . . . concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the [New Jersey Consumer Fraud Act]") (emphasis added).

B. BASF Pretends EPA Never Pronounced BASF's "Marketing" Scheme Is Not Preempted

The Minnesota Supreme Court acknowledged the EPA's edict in this case that the EPA does not regulate company "marketing" of a herbicide – ***"a company marketing decision in which the EPA had no input."*** *Peterson III*, 675 N.W.2d at 70 (emphasis added); PX82; PX334 (***"it is related to a marketing strategy and is not a regulatory matter"***) (emphasis added).[3] There is

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[2] Attached to this supplemental brief is Respondent Farmers' Appendix (RFA).

[3] PX82 is Plaintiffs' (Farmers) Trial Exhibit 82 presented to the jury (letter from EPA responding to North Dakota Department of Agriculture inquiry). PX334 is Farmers' Trial Exhibit 334 (confidential internal BASF memorandum to BASF management stating that EPA was upset that BASF had deceived the North Dakota Pesticide Control Board).

absolutely no authority supporting BASF's disregard of the EPA's own statements in this case, or its claim that Farmers' "fraudulent marketing" claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

C. BASF's Recalcitrant Attempt To Challenge Established Facts

Although BASF attempts to re-litigate before this Court the facts presented in the five-week trial, affirmed by unanimous Minnesota *Peterson II* and *III* appellate courts on review, BASF cannot challenge established facts. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("in the absence of exceptional circumstances, we would defer to the state-court factual findings"); *Graver Mfg. v. Linde Co.*, 336 U.S. 271, 275 (1940) ("[this Court] cannot . . . review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.").

D. BASF's Reprehensible Fabrication Of The Record

BASF complains – ***without record citation*** – that Farmers claim that "the *federal registration* of Poast Plus for minor crops imposed a duty on BASF to sell Poast Plus to minor crop farmers." BASF Supp. Br., p. 6 (emphasis in original). BASF blatantly misrepresents the record. Farmers argued to the jury that BASF violated its ***duty of honesty*** in the marketing of its herbicide to its customers. *See Peterson III*, 675 N.W.2d at 70 ("fraudulent marketing"); RFA 1-3 (Dec. 6, 2001 Special Verdict) ("fraud[ulent] marketing"); [Farmers'] Brief In Opposition, Sept. 24, 2004, pp. 9-19 (Statement Of Facts).

The *Peterson* jury verdict does not prohibit companies like BASF from container-labeling a product for fewer crops than registered by the EPA, or naming one product as different products for sale.[4] However, the jury verdict and unanimous Minnesota appellate rulings unequivocally recognize that a company cannot ***"fraudulent[ly] market"*** one product ***"for different uses at different prices through a 'system of deceit.'"*** *Peterson III*, 675 N.W.2d at 70 (emphasis added); *Peterson II*, 657 N.W.2d at 860 (emphasis added). Nothing about the jury verdict requires BASF to do anything other than ***honestly market its product***. BASF's fabricated accusation in its supplemental brief that Farmers claimed that the federal registration of Poast Plus "imposed a duty on BASF to sell Poast Plus to minor crop farmers" is reprehensible.[5]

---

[4] As recognized in *Peterson v. BASF Corp.*, 618 N.W.2d 821, 824 (Minn. App. 2000), *rev. denied* (Minn. Jan. 26, 2001) (*Peterson I*), the EPA permits a company to register an approved set of uses for a single active pesticide ingredient but container label the product sold to consumers for only some and not all of the registered uses. 40 C.F.R. §§ 152.113 and 152.130(b) ("split and subset labeling"). The EPA also allows companies to register alternate brand names for a registered product. FIFRA § 3(e). The EPA does not ascertain the reasons why companies choose to split or subset label their pesticides, beyond a demonstration that a split or subset label *"would not significantly increase the risk of any unreasonable adverse effect on the environment"*. 40 C.F.R. § 152.113(b) (emphasis added). Simply stated, the ***EPA does not address company marketing and pricing practices***.

[5] BASF's Minnesota counsel, Faegre & Benson, LLP, was excoriated in 2004 by the Honorable David S. Doty, Judge, U.S. District Court, Minnesota, for a lack of candor in arguments to the court in another consumer fraud class action. *In re Lutheran Brotherhood Variable Life Insurance Products Co. Sales Practices Litigation*, Civil No. 01-2433 (DSD) (SRN), slip op. at pp. 2-6 (January 7, 2004 D.Minn.) (noting that Chief U.S. District Court Judge Paul Magnuson had earlier expressed ***"quite clearly his concern over [Faegre & Benson's] professional conduct."***). *See* RFA 8, n. 2 (emphasis added).

E. BASF Misrepresents Minnesota Supreme Court Decision

BASF complains the decision of the Minnesota Supreme Court will expose the chemical industry to liability merely by following FIFRA labeling practices. BASF Supp. Br., pp. 7-8. Nothing is further from the truth. "BASF made material misrepresentations in advertisements . . . [and engaged in many other] . . . efforts to prevent farmers from learning that Poast Plus was approved for use on the same crops as Poast." *Peterson III*, 675 N.W.2d at 63-64. "BASF's . . . unconscionable conduct went beyond the label and the reach of federal law." 675 N.W.2d at 76. The Minnesota Supreme Court's holding fully accords with the teachings of this Court. *See, e.g., Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 613-14 (1991) (FIFRA does not usurp historic State police powers to regulate pesticide sales).

IV. EPA ACKNOWLEDGED DURING *BATES* JANUARY 10TH ORAL ARGUMENT THAT FRAUDULENT MARKETING REPRESENTATIONS ARE NOT PREEMPTED

A. *Bates* Has No Bearing On Farmers' "Fraudulent Marketing" Claims Which Involved "Lies" To Farmers And State Regulatory Authorities And Consideration Of The "Risk" Of Farmers Discovering The Truth

Farmers have never challenged the adequacy of the safety warnings on the Poast and Poast Plus herbicide product labels (failure-to-warn), phytotoxicity of the product (whether it harms the target crop, *e.g.*, *Bates*), or efficacy of the product (whether it kills target weeds). *Bates*, a crop injury case, has no bearing on Farmers'

fraudulent marketing claims. *See* Farmers' Jan. 4, 2004 Supp. Br., pp. 6-7 (*BASF's Regulatory And Marketing Experts And Management Conceded At Trial That Regulatory Compliance Has No Relation To Consumer Fraud*).

The Minnesota appellate courts in *Peterson II* and *III* emphasized evidence before the jury that BASF lied to state regulatory authorities, food processors, farmers and others to conceal a federal regulatory action, namely, the EPA registration of Poast Plus herbicide for the same crops as Poast, using the same safety data. *See, e.g.*, PX334 (EPA was "***not pleased***" that BASF "***misdirected***" state regulatory officials) (emphasis added); Tr. 458:1-23 (BASF executive Chris Coombs at trial admitted ***false statements*** to North Dakota Pesticide Control Board but said he was told to make the statements by BASF senior management); Tr. 1878:5-6;1559:16-251;1566:17-25;1567:1; 1681:17-25;1682:1-3 (North Dakota Agriculture Commissioner Sarah Vogel and Jack Peterson, former head of pesticide enforcement for North Dakota, bluntly and repeatedly testified at trial that BASF had lied to them: "***[I] can take hard answers, but don't lie. Just – you don't lie.***"). BASF threatened, encouraged and allowed the criminal prosecutions of farmers for "off-label" use of cheaper Poast Plus as a marketing "strategy." PX258;82;300. BASF's "confidential" internal memorandum described its marketing scheme as "***Opportunistic Exploitation***" of minor crop farmers. PX234 (emphasis added). BASF considered the "***risk***" of farmers discovering the truth, PX41 (emphasis added), and whether United States farmers could be "***controlled in future***" if BASF's fraudulent marketing and pricing schemes for Poast and Poast Plus were discovered.

PX247 (emphasis added).[6] BASF's deceit is complete with its ***fabrication of the record*** in its supplemental brief to this Court.

B. EPA Acknowledged Fraudulent Marketing Representations Are Not Preempted

The EPA through the Solicitor General, United States, acknowledged during January 10th oral argument in *Bates* that fraudulent marketing representations are not preempted: "[W]e agree that . . . off-labeled, false misrepresentation[s] [are] . . . not preempted." Tr. 43:4-7 (question by Justice O'Connor and response by Lisa S. Blatt, Esq., Assistant to the Solicitor General).

V. THIS COURT SHOULD DENY BASF'S INJUDICIOUS PETITION

There is no basis to hold BASF's petition or remand the petition to the Minnesota Supreme Court. The EPA firmly declared to North Dakota regulatory officials upon inquiry that BASF's fraudulent "marketing" scheme was not in the EPA's purview and not preempted. The jury verdict and established facts, the Minnesota courts and common sense, unanimously declare likewise. Farmers

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[6] BASF, through a personal telephone call from Executive William Wisdom, *maliciously threatened to personally sue North Dakota Agriculture Commissioner Vogel* after North Dakota took steps to address BASF's fraud. Tr. 1758:15-1759:15.

ask this Court to promptly deny BASF's injudicious petition.

Respectfully submitted,

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February 9, 2005

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In re Lutheran Brotherhood Variable Life Insurance Products Co. Sales Practices Litigation, Civil No. 01-2433 (DSD)(SRN), slip op. (January 7, 2004 D.Minn.) ..... RFA 4

RFA 1

STATE OF MINNESOTA
COUNTY OF NORMAN

IN DISTRICT COURT
NINTH JUDICIAL DISTRICT
CIVIL DIVISION

Ronald Peterson, Barry Thune, Owen Larson, Owen Larson Farms, Inc., Duane Evenson, Jeffrey Nesvig, Richard Moen, Christopher Grove, Christopher Grove Farms, Inc., David Abentroth, Glenn Asbeck, Asbeck Inc. Donald Steinbeisser, Joe G. Steinbeisser and Sonds, Inc., Stephen Pust, and Stephen Pust Farms, Inc., individually and on behalf of all others similarly situated,

Plaintiffs

v.

BASF Corporation, a foreign corporation,

Defendants.

SPECIAL VERDICT FORM

Court File No. C9-98-656

We the Jury, duly impaneled and sworn in the above-captioned matter, give the following answers to the following special verdict questions:

1. Did Defendant BASF Corporation, engage in an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's marketing and

pricing strategies for Poast and Poast Plus herbicides?

Answer: X (YES) _____ (NO)

2. Did BASF engage in a knowing omission, suppression or concealment of the truth in relation to BASF's marketing and pricing strategies for Poast and Poast Plus?

Answer: X (YES) _____ (NO)

If you answered "Yes" to either Questions 1 and/or 2 above, then answer Question 3.

3. Did BASF's conduct or actions as you have found above cause an ascertainable loss to Plaintiffs?

Answer: X (YES) _____ (NO)

If you answered Question 3 above "Yes" then go to Question 4.

4. What, if any, was the monetary value of Plaintiffs' loss caused by BASF's conduct or actions as you found above for the years 1992 to 1996?

1992	$ 2,000,000
1993	$ 5,000,000
1994	$ 3,000,000
1995	$ 4,000,000
1996	$ 1,000,000

Dated this 6th day of December, 2001, at 1:47 pm o'clock ___.m. in the County of Norman, Ada, Minnesota.

/s/ Clarice Austinson
FOREPERSON

After six hours of deliberation, ten of the jurors may agree upon and return the special verdict form.

If only ten of twelve jurors concur, all concurring jurors must sign:

1. _____ 6. _____
2. _____ 7. _____
3. _____ 8. _____
4. _____ 9. _____
5. _____ 10. _____

This special verdict form was signed at _____ o'clock ___.m.

Dated: _____, 2001.

_____

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 01-2433 (DSD/SRN)

Dean Thompson and Lolly Ann Thompson,

Plaintiffs,

v.

ORDER

Lutheran Brotherhood and Lutheran Brotherhood Variable Products Company,

Defendants.

Richard W. Bale, Esq., Marcus R. Sanborn, Esq. and Larson King, LLP, 30 East Seventh Street; Suite 2800, St. Paul, MN 55101; counsel for plaintiffs.

Edward T. Wahl, Esq., Michael F. Cockson, Esq. and Faegre Benson, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402 and James F. Jorden, Esq., Jerome V. Bolkcom, Esq., 1025 Thomas Jefferson Street N.W., Suite 400E, Washington, D.C. 20007, counsel for defendants.

(Filed Jan. 8, 2004)

This matter is before the court upon defendants' objections to Magistrate Judge Susan R. Nelson's report and recommendation, dated October 23, 2003. In her report, the magistrate judge concluded that defendants' motion to dismiss should be denied. Defendants raise four grounds of objection to the report. The court addresses them in turn.

I. Footnote 12

Defendants object to Magistrate Judge Nelson's, observations in footnote 12 of her report and recommendation regarding the tactics employed by defendants' counsel in the presentation of the merits of defendants' motion to dismiss.[1] Magistrate Judge Nelson's concerns are best expressed in her own words, which are set forth below in relevant part:

> The Court expresses serious concern regarding an argument made in Defendant's brief [in support of its motion to dismiss]. In *In re Lutheran Bhd. Variable Ins. Prod. Co. Sales practices Litig.*, No. 99-1309, 2002 WL 1023150, at *3 (D. Minn. May 17, 2002) (Magnuson, J.), the Court held that fraudulent concealment would not toll the statute of limitations for the plaintiffs' statutory (CFA) fraud claims. Alternatively, *in dicta*, the Court noted that even if fraudulent concealment did toll the limitations period for CFA claims, "Plaintiffs have failed to show that they did not have a reasonable opportunity to discover the alleged fraud until their premiums did not vanish as promised." *Id.* In support of that *dicta*, the Court cited evidence submitted by the defendants (Wahl. Aff. Ex. 40 at 2) . . . that at least one of the plaintiffs, "Mr. Deon Thompson [not to be confused with Dean Thompson], received annual statements from Lutheran Brotherhood that told him as early as 1988 that his policy would terminate in 1993 if no further premiums were paid" and [that] "[t]hese statements should have

[1] Defendants are represented by the law firm of Faegre & Benson, LLP, through its partners Jerry W. Snider and Edward T. Wall, and associates Michael F. Cockson and Erik Girvan.

alerted Plaintiffs to the fact that the policies were not performing as Lutheran Brotherhood allegedly promised they would." *Id.*

Later . . . Lutheran Brotherhood relied on the Court's *dicta* in the May 17, 2002 Order to argue that the plaintiffs' common law fraud claim was also barred by the statute of limitations because the plaintiffs should have known of the existence of the claim. *Id.* at *9. The Court rejected this argument. . . . The Court explained that the evidence it relied on as the basis for its *dicta* in the May 17, 2002 Order, namely the evidence that Deon Thompson received a notice in 1988, was erroneous because that notice, which was submitted as evidence by Lutheran Brotherhood's attorneys, "related to a policy that is not at issue here." *Id.* The Court then admonished Lutheran Brotherhood:

> Lutheran Brotherhood should have brought that error to the Court's attention, but at the least, Lutheran Brotherhood should not now attempt to capitalize on that error by using the Court's mistaken assumption as support for the instant Motion. The Court reminds counsel for both parties of their duties as officers of the Court, and will not countenance misrepresentations of the facts or the law, whether intentional or inadvertent. *See Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 833 (8th Cir. 1992).

Id. at 10.

Remarkably, in this case, Lutheran Brotherhood, again, attempts to capitalize on the

> evidentiary error from the May 17, 2002 Order. In this case, Lutheran Brotherhood states that [c]ourts do not hesitate to dismiss claims where facts pleaded, or otherwise on the record, show that a party knew or should have known of the facts long enough before commencing their action that the action is time-barred." (Def.s' Reply Mem. in Supp. of Mot. to Dismiss, at 4). In support of that proposition, Lutheran Brotherhood leads with a citation to the May 17, 2002 Order: "*See In re Lutheran Bh'd*, 2002 WL 1023150, at *3 (plaintiffs had the opportunity, as a matter of law, to discover claims where the record showed that plaintiffs received statements that 'should have alerted Plaintiff[] to the fact that the policies were not performing as Lutheran Brotherhood allegedly promised they would')." (Def.s' Reply Mem. in Supp. of Mot. to Dismiss, at 4). The parenthetical explanation of the May 17, 2002 Order is not only patently erroneous as a matter of law but Lutheran Brotherhood, again, by seeking to do what Judge Magnuson admonished them not to do, seeks to capitalize on the "Court's mistaken assumption as support for" the Motion to Dismiss in this case. *Id.* *10.

(R&R at 16, n.12.)

In their objections to the report and recommendation, defendants contend that Magistrate Judge Nelson misunderstands the sequence of events. Defendants argue that, until the July order was issued, they believed that the dictum of the May order stood for the proposition that any statement revealing a fluctuation in interest rates, even one pertaining to a policy that was not the subject of a plaintiff's claim, was sufficient to place a particular plaintiff on notice that all his policies were not performing

as originally projected. Based on that interpretation of the dictum, defendants cited the May order to Magistrate Judge Nelson in their reply memorandum, filed May 13, 2003, and at argument on June 26, 2003. Defendants claim they had no reason to doubt the soundness of their argument until Judge Magnuson issued his July order, at which time the briefing and argument of defendants' motion to dismiss in this case had already been completed. Defendants therefore conclude that "the chronology of events demonstrates [their] good faith." (Defs.' Obj. at 2.)

Defendants' excuse is weak. Three months elapsed between Judge Magnuson's issuance of the July order and Magistrate Judge Nelson's issuance of her report and recommendation. During this time defendants remained silent and made no effort to inform Magistrate Judge Nelson that, Judge Magnuson's July order had undermined the validity of their reliance upon his May order. Therefore, even if Magistrate Judge Nelson mistakenly believed that defendants had read the July order when they made their arguments, defendants' subsequent failure of candor wholly justifies her admonishment of them.[2]

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[2] Judge Magnuson's July order expressed quite clearly his concern over counsel's professional conduct. Whether or not counsel believed the concern was justified, they should have taken prompt action to avoid allowing their arguments before Magistrate Judge Nelson to compound the problem. A letter to the court and plaintiffs' counsel of a single paragraph, stating that defendants would no longer rely on Judge Magnuson's May order as persuasive authority for their arguments, would have sufficed to lay the matter to rest. Counsel, however, chose not to take such action. Consequently they are in no position to complain about Magistrate Judge Nelson's comments.

Defendants are correct that they and their counsel may not be sanctioned inasmuch as neither Rule 11 of the Federal Rules of Civil Procedure or any of the Minnesota Rules of Professional Conduct explicitly imposes an ongoing duty to update briefs after they are filed with the court. *See* Minnesota Rules of Professional Conduct R. 3.3 & 4.1 (2002); *Samuels v. Wilder*, 906 F.2d 272, 274-75 (7th Cir. 1990). To say that counsel's silence is not punishable, however, is not to say that Magistrate Judge Nelson or any other judicial officer of this district should tolerate it or let it pass without comment. Magistrate Judge Nelson's observations in footnote 12 of the report and recommendation were an appropriate exercise of her authority to demand the highest standards of practice and candor among the members of the federal bar. If the litigation should reach a stage where counsel appear before this court, they will find its expectations no less stringent then those of Magistrate Judge Nelson. Defendants' request that footnote 12 be stricken is accordingly denied.

II. Adequacy of Pleading – Fraud and Fraudulent Concealment

Defendants object to the magistrate judge's conclusion that plaintiffs have adequately pleaded fraud and fraudulent concealment. Defendants' objection is based on a syllogism. For their major premise, they point out that plaintiffs allege that defendants discovered in 1987 that approximately one-third of its universal life policies would "self destruct." (Compl. ¶ 53.) Defendants' minor premise is that 1987 is later than 1985, the year when plaintiff Dean Thompson purchased one of defendants' policies. Defendants therefore conclude that plaintiffs' pleading is inadequate because defendants could not have, in 1985,

fraudulently concealed information they did not learn until 1987.

As plaintiffs point out, however, defendants ignore a myriad of other allegations in the complaint. For example, plaintiffs allege that, in approximately 1982, defendants adopted a business strategy that would allow them to capitalize on a surge in interest rates by enticing customers with projections that would be unsustainable over the long term. (*See* Compl. ¶ 26.) Plaintiffs allege that elements of the strategy included a change in the way defendants recognized contract loans, a change in the way defendants calculated dividend projections, defendants' introduction of, a new "universal life" insurance product, defendants' adoption of the vanishing premium concept, and defendants' liberalization of its rules against internal replacement of customers' policies. (Compl. ¶¶ 26-27.)

Plaintiffs further allege that, pursuant to their strategy, defendants failed to disclose the impact that increasing insurance costs and declining interest rates would have on their policies' performance. (Compl. ¶ 29.) Plaintiffs also allege that defendants employed a software program to generate misleading projections regarding their policies' performance and that defendants failed to disclose that the results generated by the software were based on assumptions that defendants knew were faulty. (Compl. ¶ 30.) It is clear from the context of preceding and following paragraphs that the allegations in, paragraphs 29 & 30 apply to a period of time beginning in approximately 1982.

In discussing the adequacy of plaintiffs' fraudulent concealment claim, the magistrate judge cited the allegations already discussed and others. (R&R at 14.) Considering all

the allegations of the complaint, the magistrate judge correctly held that plaintiffs adequately pleaded fraud and fraudulent concealment. Defendants, aside from their misguided syllogism, cite no authority to the contrary. Accordingly, the magistrate judge's conclusion is affirmed.

III. The 1994 Update – Fraudulent Concealment

Defendants also argue that plaintiffs may not rely on the doctrine of fraudulent concealment because plaintiffs should have become aware of their claims in 1994 when defendants sent them an update disclosing that their policies' cash value was less than, projected. The magistrate judge correctly determined that plaintiffs must establish that they were actually unaware of the facts on which their claims are based, a point which defendants concede. *See Williamson v. Prasciunas*, 661 N.W.2d 645, 650 (Minn. Ct. App. 2003). Rather, defendants contend that the magistrate judge erred in determining which facts constitute the "defect" that is the basis for plaintiffs' claims. (*See* Defs.' Obj. at 7.)

Defendants argue that the "defect" which underlies plaintiffs' claims is the failure of the policies to perform as initially projected. Defendants contend that when plaintiffs "became alarmed" in 1994 about the performance of their policies, they had the information they needed to pursue their claims for relief. (Defs.' Obj. at 7-8.)

Defendants misapprehend the nature of the "defect" that gives rise to plaintiffs' claims. Plaintiffs' claims are not based upon the failure of their policies to perform well. There is no basis in law for a bare claim that performance of an investment did not meet initial expectations. Rather, as the magistrate judge aptly pointed out, the gravamen of

plaintiffs' claims is defendants' failure to disclose material information regarding the policies. (R&R at 14.) As the magistrate judge noted, the 1994 update did not impart the material information which defendants allegedly concealed from plaintiffs. The 1994 update only suggested that plaintiffs may be suffering injury.

Defendants cite *Veldhuizen v. A.O. Smith Corp.*, 839 F. Supp. 669 (D. Minn. 1993), for the proposition that plaintiffs' knowledge of their injury bars them from invoking fraudulent concealment. In *Veldhuizen*, the defendant induced the plaintiff, a farmer, to purchase certain grain silos by promising "better feed, improved herd health, increased milk production and lower costs." 839 F. Supp. at 671-72. Later, plaintiff observed that his cows produced more milk while eating bought feed as opposed to grain stored in defendant's silos. *Id.* at 673. Thereafter plaintiff consulted two veterinarians who identified the silos as the cause of the reduced milk production. *Id.* at 673. Plaintiff, however, did not credit the veterinarians' conclusion and consequently did not file suit against the defendant until more than ten years later. *Id.* at 673. Plaintiff argued that the doctrine of fraudulent concealment tolled the statute of limitations. *See id.* The court granted defendant's motion for summary judgment, holding "that regardless of any concealment the limitations period began to run, as a matter of law, in the late 1970s when [the veterinarians] attributed the cause of the problems experienced by the Veldhuizens to the Harvestore silos." 839 F. Supp. at 669.

Veldhuizen is inapposite to the present case. Veldhuizen discovered his injury when he noted that his herd's, milk production was suffering. It was not until Veldhuizen consulted the veterinarians, however, that he discovered the defendant's silos were the cause of his injury. The

court held that Veldhuizen's claim was barred as a matter of law not because he discovered his injury, but rather because Veldhuizen sat on his rights after two experts informed him that the defendant had caused his injury.

In this case, although plaintiffs discovered the fact of their injury in 1994, they did not then necessarily discover that the injury was caused by a fraud allegedly perpetrated by defendants. Investment performance, like milk production, is influenced by many factors. The ill news brought by the 1994 update did not, of itself, indicate wrongdoing on the part of the defendants. Whether the update obligated plaintiffs to investigate the matter more diligently than they did is, as rightly observed by the magistrate judge, a fact question not amenable to determination in the context of a motion to dismiss. *See Force v. ITT Hartford Life & Annuity Ins. Co.*, 4 F. Supp. 2d 843, 860 (D. Minn. 1998). In any event, the magistrate judge correctly held that the 1994 update does not necessarily foreclose application of the fraudulent concealment doctrine to plaintiffs' claims.

IV. Consumer Fraud Act and Deceptive Trade Practices Act claims Applicability of Fraudulent Concealment Doctrine

Finally, defendants object to the magistrate judge's conclusion that the doctrine of fraudulent concealment can apply to toll the statute of limitations with respect to plaintiffs' claims under the Prevention of Consumer Fraud Act ("CFA"), Minn. Stat. §§ 325F.68-325F.70, and the Uniform Deceptive Trade Practices Act ("DTPA"), Minn. Stat. §§ 325D.43-325D.48. In support of their objection, defendants cite Judge Magnuson's May order. *See In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*,

2002 WL 1023150, at *3 (D. Minn., May 17, 2002) ("It is not clear to this Court that the doctrine of fraudulent concealment is different than a discovery allowance, which both parties agree does not apply to CFA claims.")

Judge Magnuson's order notwithstanding, the magistrate judge correctly concluded that the doctrine of fraudulent concealment is distinguishable from the discovery rule under Minnesota law. *See Fabio v. Bellomo*, 504 N.W.2d 758, 764 n.2 (Minn. 1993) (discussing discovery rule and fraudulent concealment as independent doctrines); *Giles v. Sanford Mem'l Hosp. & Nursing Home*, 371 N.W.2d 635, 638 (Minn. Ct. App. 1985). The magistrate judge was also right to note that the Minnesota Court of Appeals has indicated in dicta that the doctrine of fraudulent concealment does indeed apply to DTPA claims. *See Appletree Square I Ltd. P'ship v. Investmark, Inc.*, 494 N.W.2d 889, 892 (Minn. Ct. App. 1993). Further, the court agrees with the magistrate judge's conclusion that the doctrine of fraudulent concealment may toll the statute of limitations for CFA and DTPA claims.

Accordingly, after a de novo review of the file and record, **IT IS HEREBY ORDERED THAT**:

1. The report and recommendation of the magistrate judge [Docket No. 33] is adopted in its entirety.

2. Defendants' motion to dismiss [Docket No. 19] is denied.

3. Pursuant to the magistrate judge's order of December 16, 2003 [Docket No. 38], defendants shall have until ten days after the issuance of this order to answer or otherwise respond to plaintiffs' amended complaint.

Dated: January 7, 2004

/s/ David S. Doty
David S. Doty, Judge
United States District Court

Supreme Court, U.S.
FILED
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(10)

No. 04-81

In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

BASF's pending petition presents two important issues of federal law, the first involving preemption of state-law claims under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 *et seq.*, and the second involving the First Amendment. BASF submits this supplemental brief under Rule 15.8 to discuss the impact of the Court's ruling in *Bates* v. *Dow Agrosciences, LLC*, No. 03-388, on the first issue presented by the petition.

ARGUMENT

I. THE DECISION BELOW IS FLATLY INCONSISTENT WITH *BATES*

The *Bates* decision directly supports petitioners' argument in this case. The Court has stated that FIFRA "preempts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations." Slip. op. at 13-14; see also *id.* at 20 ("We emphasize that a state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive preemption."). In this case, respondents' claims clearly do establish state-law standards for labeling that diverge from EPA's regulations.

Because the Minnesota Supreme Court did not follow the rule of preemption that the Court has announced, and because this case presents a perfect opportunity for the Court to explain the affirmative reach of FIFRA preemption in an important and recurring context, the petition for certiorari should be granted. At the very least, the Court should grant, vacate, and remand the case to the Minnesota Supreme Court so that it may reconsider its decision in light of the *Bates* opinion.

A. Because Respondents' Claims Impose State-Law Labeling Standards That Diverge From Specific EPA Regulations, *Bates* Establishes That They Are Preempted

Concurring in the *Bates* decision, Justice Breyer wrote separately "to stress the practical importance of the Court's statement that state-law requirements 'be measured against' relevant [EPA] regulations 'that give content'" to FIFRA. Slip. op. (Breyer, J., concurring), at 1. The multi-million dollar judgment below is premised on a direct attack on labeling practices that EPA either mandated or expressly approved in regulations adopted under FIFRA.[1] Because the decision below thus "alter[s] * * * the substantive rules governing liability for labeling" (*Bates*, slip. op. (Thomas, J., concurring in the judgment in part and dissenting in part), at 1), it conflicts with this Court's decision in *Bates* that such claims are preempted.

Although respondents now attempt to obscure their focus on BASF's labeling, they repeatedly acknowledged below that "fraudulent and deceptive labeling" is "the crux of this case." See Letter from plaintiff's counsel to Judge Kraker (Nov. 2, 1998), at 3 n.4; see also Pl. Supp. Ans. to Interrog. No. 7 (1/27/00) ("BASF knowingly concealed, suppressed, or omitted from the various labels that accompanied Poast Plus the fact that EPA registered Poast Plus for use on minor crops. This knowing concealment, suppression or omission of material facts forms the basis of this action."); Motion in

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[1] Unlike *Bates*, which was decided on an early summary judgment motion, judgment in this case was entered after an extended trial ending in a jury verdict. The full record that is available here proves beyond doubt that respondents' claims rested squarely on their contention that BASF's EPA-approved labeling practices were wrongful.

Limine Tr. at 150 (respondents' counsel states that BASF "could have moved all those crops over to the Poast Plus label, but they didn't. They designed this scheme and plan to improperly exploit minor crop farmers."). Respondents' fraud claim should not have been allowed to proceed, because the aspects of the labeling that they attacked were either required or expressly authorized by FIFRA.

First, respondents claimed that BASF committed consumer fraud by naming and registering Poast and Poast Plus as two different pesticides when, in *their* view, the two products were functionally identical. See, *e.g.*, Cmplt. ¶ 2 (alleging that BASF's deceptive acts include "advertis[ing] and market[ing] these equivalent formulations * * * as two separate products under two separate brand names and two separate prices"); Tr. 2529:1-2 (plaintiffs' counsel argues that "[t]he company marketed and sold one product as two different products to exploit a segment of the market"); Tr. 1170, 1187, 1204, 1225 (plaintiff repeatedly contends that Poast and Poast Plus were "identical product[s]" and admits that "if they actually were different," he "wouldn't" "have a complaint"); Tr. 1296 (plaintiff states that his complaint against BASF rests on "the fraud of selling one product as two"); Tr. 563, 583 (plaintiff states that Poast and Poast Plus are "the same" and "are identical products"); Tr. 2174 (plaintiff states that his "complaint to BASF is that they lied to us because Poast and Poast Plus is the same product"). See also Pet. 13; Reply Br. at 2.

Because the formulations of Poast and Poast Plus differ to the degree specified by federal regulations, however, those regulations *required* BASF to label the products with two different names and to register them as separate products. See Pet 3, 4. Thus, the state-law labeling standard that this judgment creates – *i.e.*, that pesticides having the same active ingredient should be labeled as the same product – plainly diverges from FIFRA's requirements.

Second, respondents contended that BASF's labels were deceptive and unconscionable because the labels did not indicate that Poast Plus was federally-registered for use on minor crops[2] and thus did not allow minor crop farmers lawfully to use the product. See, *e.g.*, Tr. 3768 (respondents' counsel states in closing argument that "the only problem was, the minor crop grower couldn't get access to [Poast Plus] because BASF denied them access to it"); see also Pet. 12-13; Reply Br. at 3.

As respondents have repeatedly conceded, however, an EPA regulation *specifically provided* that manufacturers were entitled to omit federally-registered uses from the labeling. 40 C.F.R. § 152.130(b); see also Pet. 3. Because no State had registered Poast Plus for minor crops, furthermore, it would have been illegal in *every* State for BASF to label or market Poast Plus for that purpose or for minor crop farmers to use Poast Plus. The state-law labeling standard imposed by this aspect of the case – *i.e.*, that pesticide labels may be considered deceptive and unconscionable if federally-registered uses are excluded from them – thus also flatly contradicts EPA's labeling standards.

As Justice Thomas stated in *Bates*, a consumer fraud claim "should be pre-empted insofar as it imposes liability for label content where FIFRA would not." Slip. op. (Thomas, J., concurring in the judgment in part and dissenting in part), at 2. Under the decision below, however, a plaintiff seeking to second-guess EPA's pesticide labeling rules could do so in virtually any case simply by invoking the moniker of

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[2] See, *e.g.*, Tr. 1397-1398 (labels were "deceptive" in stating "that Poast Plus could be used only on those four crops"); Tr. 590 (label misleadingly "says you can't use it [for minor crops], but in actuality the registration said it's okay"); Tr. 1448 ("I felt that we were being deceived * * * [because] the crops that were registered for Poast Plus and what was actually put on the label are two different things").

consumer fraud. Because the Minnesota Supreme Court's decision is irreconcilably in conflict with *Bates*, it should not be permitted to stand.

B. The Judgment Below Cannot Be Squared With *Bates* Because The Trial Court Refused To Instruct The Jury Regarding FIFRA's Pertinent Requirements

In *Bates*, this Court directed that, "[i]f a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as an regulations that add content to these standards." Slip. op. at 8. As the Court recognized, such instructions are necessary to guard against the possibility that a state-law judgment will impose requirements that are "in addition to or different from" federal law. *Id.* In this case, however, the trial court refused BASF's request for jury instructions explaining the FIFRA regulations applicable to its conduct. See Pet. 8.

As explained in more detail in BASF's petition and reply brief, BASF's labeling of Poast and Poast Plus – which respondents contended was deceptive and unconscionable – complied fully with EPA's regulations. The applicable regulations included the rules requiring separate registration of products having sufficiently different formulations, and the "subset labeling rule," which permits a manufacturer to label a pesticide for only a subset of its registered uses.

BASF asked the trial court to instruct the jury on FIFRA's pertinent requirements. See Defendant BASF's Supp. Proposed Jury Instr. Nos. 18-37. For example, BASF requested an instruction that "[t]he EPA's regulations prohibited BASF from using the exact same name for Poast and Poast Plus." BASF's Supp. Proposed Jury Instr. No. 29. BASF also requested an instruction that "EPA allows a company to label an herbicide for fewer crops than registered by the EPA." BASF's Supp. Proposed Jury Instr. No. 21. Acceding to respondents' objections, the trial court refused to

give these instructions, or any other instructions explaining FIFRA's requirements. Tr. 3831-3850.

Accordingly, the jury in this case was asked to evaluate BASF's conduct under *state* law without having any authoritative guidance regarding *federal* requirements. Without such guidance, there was no way for the jury to avoid imposing state-law labeling standards that were "in addition to or different from" FIFRA's standards. Because the decision below thus cannot be squared with this Court's directive in *Bates*, it should not be permitted to stand.

C. In Tension With *Bates*, The Decision Below Imposes A State-Law Duty To Market Federally-Registered Products That Overrides Manufacturers' Legitimate Safety Concerns

In deciding *Bates*, the Court recognized that EPA's registration of a pesticide does not necessarily reflect a judgment by the agency that the product is safe and efficacious for all of its approved purposes. Slip. op. at 7. Moreover, the Court suggested in *Bates* that a previously-approved label may be deemed "misbranded" under FIFRA based on later-developed information or testing. *Id.* at 14. Under the decision below, however, federal registration of a product creates a state-law duty to market the product for all registered uses. Because that pernicious rule will undermine FIFRA and cannot be squared with *Bates*, the decision below should not be permitted to stand.

The Minnesota Supreme Court noted that EPA registered Poast Plus for minor crops based on the same *residue* testing data that it used to approve Poast. Pet. App. 4a. Pursuant to the waiver of efficacy data review requirements that the Court considered in *Bates* (slip op. at 7), however, EPA did *not* review *crop-safety* testing data before it registered Poast Plus for use on minor crops. While BASF had conducted some testing of Poast Plus on minor crops prior to registration, its *internal* standards required it to conduct extensive

additional safety testing before it sold Poast Plus for minor crops. As the documents introduced at trial demonstrated, BASF's scientists never were satisfied that the product was sufficiently *proven safe* to be sold for minor crops: the full range of the requisite testing was never completed, and the limited testing that *was* done had raised red flags about the product's suitability for minor crops. Tr. 2923, 2946.

As discussed above, EPA's own rules sensibly permit a manufacturer *not* to include all registered uses on the labels. Under the decision below, however, a manufacturer cannot exclude registered uses from the labeling without risking liability under state-law consumer fraud statutes. To avoid the risk of such liability, a manufacturer must expose itself to potential liability for design defect or inadequate testing claims by marketing a product in spite of safety concerns. Because respondents' action thus imposes "state-law labeling requirements that are 'in addition to or different from' the labeling and packaging requirements under FIFRA" (*Bates*, slip op. at 14), and are completely at odds with sound public policy, the decision below should be reversed.

D. Respondents' Action Tramples Upon The States' Important Role In Pesticide Regulation, Which This Court Recognized In *Bates*

In *Bates*, the Court recognized that FIFRA expressly preserves an important role for the States in regulating pesticides. Slip. op. at 9. Indeed, every State exercises its prerogative under FIFRA to require separate state registration (approval) of pesticides before they may be sold within its borders. See Tr. 2661-2662. Here, it was undisputed that no State had registered Poast Plus for use on minor crops, and that BASF could not lawfully have labeled or marketed Poast Plus for minor crops in any State without first securing the appropriate state registration.

Nevertheless, the Minnesota Supreme Court found that BASF committed consumer fraud by failing to seek state reg-

istration for Poast Plus. See Pet. App. at 21a ("the 'problem' * * * was BASF's failure to seek state registration for Poast Plus on all the crops"). The court also simply *presumed* that the independent regulators in each of the 50 States would have approved the use of Poast Plus on minor crops in their States if BASF only had asked. See *id.* Yet any State (and all States) could have denied BASF permission to market Poast Plus on minor crops.[3] In treating state registration as a given, the Minnesota Supreme Court stripped away the autonomy of each State – carefully preserved by Congress in enacting FIFRA – to *independently* review, and approve or disapprove, the pesticides to be used in that State – rendering the States' role a nullity.

Because the Minnesota Supreme Court, in ruling *against* preemption, has overlooked the States' important role in regulating pesticides under FIFRA, its decision cannot be squared with *Bates* and should be further reviewed.

II. RESPONDENTS' CLAIMS UNDERMINE EPA'S AUTHORITY OVER PESTICIDE LABELING

In his concurring opinion in *Bates*, Justice Breyer opined that "EPA may prove better able than are courts to determine whether general state law tort liability rules * * * bring about a counterproductive 'crazy-quilt of anti-misbranding requirements'" that undermine FIFRA. Slip. op. (Breyer, J., concurring), at 1-2. Because the decision below imposes labeling rules that squarely conflict with existing EPA regulations and thus undermines EPA's authority over pesticide labeling, we have little doubt that EPA would determine that respondents' claims are preempted.

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[3] Indeed, California did not allow BASF to market Poast Plus for *any* crops, despite the fact that Poast Plus had a federal registration. Ignoring that fact, the court below ruled that California farmers nevertheless were entitled to damages under New Jersey law because BASF did not successfully register Poast Plus for *minor* crops in California.

In their most recent supplemental brief, however, respondents contend that the agency would oppose preemption in this case. As we have shown elsewhere (see Reply Br. at 4-5, 6-7) and discuss briefly here,[4] that assertion is wrong. Should the Court have any question that respondents' claims would interfere with EPA's ability to administer the federal pesticide labeling scheme, however, we respectfully suggest that the Court invite the Acting Solicitor General to submit a brief

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[4] For example, respondents rely on the statement by an EPA official that the omission of minor crops from the Poast Plus label was "a company marketing decision in which the EPA had no input." Resp. 2nd Supp. Br. at 3. As we have previously explained, however, the "company marketing decision" at issue was *BASF's decision to use subset labeling*, a practice that EPA regulations expressly authorize. Respondents also cite an EPA official's statement that this was "not a regulatory matter." *Id.* But that statement, which came in response to one state official's requests that EPA expand the registration of Poast Plus to include minor crops, merely explained that regulatory action was not needed because Poast Plus already had a federal registration for minor crops. Another EPA official stated publicly that BASF's conduct was "perfectly legal" under FIFRA. See *Farmers Win Fight With Pesticide Company*, THE BISMARCK TRIBUNE (May 18, 1997), at 8A.

Respondents also argue that EPA has disclaimed any involvement in pesticide pricing, which they contend is at the heart of their case. See Resp. 2nd Supp. Br. 5 n.4. In fact, EPA has affirmatively stated that it has no interest in using FIFRA to control pesticide pricing. See, *e.g.*, DX 636 ("we do not believe that Congress, under FIFRA, intended the Agency to evaluate or challenge pricing approaches employed by the pesticide manufacturers"). If claims such as respondents' are recognized, however, then FIFRA will impose pricing restrictions through the back door because, under respondents' theory, it is unlawful exploitation of the federal regulatory scheme to sell pesticides sharing the same active ingredient at different prices.

expressing the views of the United States regarding the issue of FIFRA preemption presented by this case.

III. THE FIRST AMENDMENT ISSUE PRESENTED ALSO MERITS REVIEW

This case also presents an important First Amendment issue. The jury was invited to hold BASF liable, in part, on the basis of truthful statements to regulatory authorities regarding the possible illegal off-label use of its products and truthful statements in a magazine article about the laws that govern pesticide use. Because the Minnesota Supreme Court's decision threatens severely to inhibit corporate speech on issues of substantial public concern – and because, in the event the Court remands the case for reconsideration of the FIFRA issue, the lower courts will otherwise repeat their errors under the First Amendment – a grant of certiorari on that issue is warranted.

CONCLUSION

The petition for certiorari should be granted. In the alternative, the petition should be granted and the case summarily vacated and remanded for consideration in light of *Bates*.

Respectfully submitted.

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RESPONDENT FARMERS' SUPPLEMENTAL BRIEF OPPOSING PETITIONER BASF'S APRIL 27, 2005 SUPPLEMENTAL BRIEF:

- **EPA TO STATE REGULATORY OFFICIALS: *"IT IS RELATED TO A MARKETING STRATEGY AND IS NOT A REGULATORY MATTER"***
- **NORTH DAKOTA REGULATORY OFFICIALS TESTIFYING AT TRIAL ABOUT BASF'S LIES AND DECEIT: *"[I] CAN TAKE HARD ANSWERS, BUT DON'T LIE . . . JUST – YOU DON'T LIE"***
- **MINNESOTA SUPREME COURT: *"[F]ARMERS . . . CONSUMER FRAUD CLAIM IS NOT BASED ON BASF'S LABELS BUT RATHER ON FRAUDULENT MARKETING TECHNIQUES"***

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I. SUMMARY ARGUMENT

Respondents (Farmers) respectfully submit this supplemental brief opposing Petitioner's (BASF) Supplemental Brief (Supp. Br.) filed April 27, 2005 and served on Farmers' counsel mid-morning of April 28th. BASF's Supp. Br., ostensibly filed to address this Court's ruling in *Bates v. Dow Agrosciences*, LLC, No. 03-388 (U.S. Apr. 27, 2005), is a calculated and indecent misrepresentation of the record.

II. *BATES* HAS NO BEARING ON FARMERS' "FRAUDULENT MARKETING" CLAIMS WHICH INVOLVED LIES TO FARMERS AND STATE REGULATORY AUTHORITIES AND CONSIDERATION OF THE RISK OF FARMERS DISCOVERING THE TRUTH

A. BASF Pretends Jury Verdict And Seven Years Of Litigation Never Occurred

This case was ***tried to a 12-member jury for five weeks*** in November and December, 2001, with a unanimous finding that BASF engaged in "deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's ***marketing and pricing strategies***" and a "knowing omission, suppression or concealment of the truth" as part of its marketing scheme. *See* Farmers' Supp. Br. filed Feb. 9, 2005 at RFA (December 6, 2001 Special Verdict) (emphasis added); Clerk Doc. 575. The Minnesota Supreme Court observed there was evidence before the jury of BASF's ***"material [marketing] misrepresentations"*** and ***"less than candid responses"*** regarding the registration status of its products. *Peterson v. BASF Corp.*, 675 N.W.2d 57, 63-64 (Minn. 2004) (emphasis added); *see also Peterson v. BASF Corp.*, 657

N.W.2d 853, 866 (Minn. App. 2003) (*Peterson II*) ("jury could conclude that BASF's ***marketing scheme*** ... concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the [New Jersey Consumer Fraud Act]") (emphasis added).

B. "It Is Related To A Marketing Strategy And Is Not A Regulatory Matter"

The Minnesota Supreme Court acknowledged the EPA's edict in this case that the EPA does not regulate company "marketing" of a herbicide – ***"a company marketing decision in which the EPA had no input."*** *Peterson III*, 675 N.W.2d at 70 (emphasis added); PX82; PX334 (***"it is related to a marketing strategy and is not a regulatory matter"***) (emphasis added).[1] There is absolutely no authority supporting BASF's disregard of the EPA's own statements in this case, or its claim that Farmers' "fraudulent marketing" claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[2]

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[1] PX82 is Plaintiffs' (Farmers) Trial Exhibit 82 presented to the jury (letter from EPA responding to North Dakota Department of Agriculture inquiry). PX334 is Farmers' Trial Exhibit 334 (confidential internal BASF memorandum to BASF management stating that EPA was upset that BASF had deceived the North Dakota Pesticide Control Board).

[2] This litigation is not unique. In the late 1990s several class actions of United States consumers with identical claims involving deceptive marketing of a federally-regulated product as different products for different uses, at widely-varying prices, were settled. *See Kropinski v. Johnson & Johnson*, Docket No. L-88886-96 (Sup.Ct.N.J. 1997), RFA255-58 (deceptive marketing of a contact lense as different lenses, and exploitation of FDA regulatory process, to exact a premium price from consumers); *Roberts v. Bausch & Lomb, Inc.*, Case No. 94-C-1144-W (N.D. Alabama

(Continued on following page)

C. "[I] Can Take Hard Answers, But Don't Lie . . . Just – You Don't Lie"

Farmers have never challenged the adequacy of the safety warnings on the Poast and Poast Plus herbicide product labels (failure-to-warn), phytotoxicity of the product (whether it harms the target crop, *e.g., Bates*), or efficacy of the product (whether it kills target weeds). *Bates*, a crop injury case, has no bearing on Farmers' fraudulent marketing claims. *See* Farmers' Jan. 4, 2004 Supp. Br., pp. 6-7 (*BASF's Regulatory And Marketing Experts And Management Conceded At Trial That Regulatory Compliance Has No Relation To Consumer Fraud*).

1997), RFA268-78 (same); *Kramer v. Bausch & Lomb, Inc.*, Index No. 110972/95 (N.Y. App. Div. 1999), RFA260-67 (deceptive marketing of a contact lense solution as several different products, and exploitation of the federal FDA regulatory process, to exact a premium price from consumers). The published values of settlements to defrauded U.S. consumers: *Kropinski* ($840 million); *Roberts* ($67 million); *Kramer* ($12 million).

In a 1997 prosecution of Bausch & Lomb under consumer protection laws, Seventeen Attorneys General, in successfully procuring a cease and desist order, cast aside Bausch & Lomb's defense that the FDA had approved three different lense container (marketing) labels:

> 4. Bausch & Lomb: (a) represented, directly and by implication, that its practice of marketing identical contact lenses under different names and at differing prices was approved by the United States Food and Drug Administration ("FDA") or was due to the need to comply with FDA requirements governing the labeling of contact lenses, when in fact ***the FDA has neither approved nor required such Bausch & Lomb pricing and marketing practices*** and (b) ***by such false, misleading and deceptive representations violated the States' consumer protection laws.***

Farmers' Minnesota Supreme Court Brief at RFA191 (emphasis added).

The Minnesota appellate courts in *Peterson III* and *II* emphasized evidence before the jury that BASF lied to state regulatory authorities, food processors, farmers and others to conceal a federal regulatory action, namely, the EPA registration of Poast Plus herbicide for the same crops as Poast, using the same safety data. *See, e.g.*, PX334 (EPA was "***not pleased***" that BASF "***misdirected***" state regulatory officials) (emphasis added); Tr. 458:1-23 (BASF executive Chris Coombs at trial admitted ***false statements*** to North Dakota Pesticide Control Board but said he was told to make the statements by BASF senior management); Tr.1878:5-6;1559:16-25l;1566:17-25;1567:1;1681:17-25;1682:1-3 (North Dakota Agriculture Commissioner Sarah Vogel and Jack Peterson, former head of pesticide enforcement for North Dakota, bluntly and repeatedly testified at trial that BASF had lied to them: "***[I] can take hard answers, but don't lie. Just – you don't lie.***"). BASF threatened, encouraged and allowed the criminal prosecutions of farmers for "off-label" use of cheaper Poast Plus as a marketing "strategy." PX258;82;300. BASF's "confidential" internal memorandum described its marketing scheme as "***Opportunistic Exploitation***" of minor crop farmers. PX234 (emphasis added). BASF considered the "***risk***" of farmers discovering the truth, PX41 (emphasis added), and whether United States farmers could be "***controlled in future***" if BASF's fraudulent marketing and pricing schemes for Poast and Poast Plus were discovered. PX247 (emphasis added).[3] BASF's management conceded during trial that BASF's marketing for Poast/Poast Plus was misleading:

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[3] BASF, through a personal telephone call from Executive William Wisdom, *maliciously threatened to personally sue North Dakota Agriculture Commissioner Vogel* after North Dakota took steps to address BASF's fraud. Tr.1758:15-1759:15.

A. (BASF's Chris Coombs) (reading from BASF marketing materials) Okay. Poast Plus is registered for use on the following crops only. Cotton, soybeans, peanuts and alfalfa.

Q. ***Stop there. Do you consider it to be a material omission to say that Poast Plus is registered for use on the following crops only, cotton, soybeans, peanuts and alfalfa, when you knew that it was registered on all of the same crops as Poast?***

A. ***Yes, I would consider that.***

Tr.3588:15-24.

D. This Court In *Bates* Recognized – And EPA During Oral Argument Acknowledged – That Fraudulent Marketing Representations Are Not Preempted

This Court in *Bates* recognized that fraudulent marketing representations are not preempted. *Bates*, slip op. at 12, n. 17 ("To the extent that . . . fraud claims are based on oral representations made by Dow's agents, they [are not preempted]." The EPA through the Solicitor General, United States, acknowledged during January 10th oral argument in *Bates* that fraudulent marketing representations are not preempted: "[W]e agree that . . . off-labeled, false misrepresentation[s] [are] . . . not preempted." Tr. 43:4-7 (question by Justice O'Connor and response by Lisa S. Blatt, Esq., Assistant to the Solicitor General).

E. Nothing About The Jury Verdict Requires BASF To Do Anything Other Than Honestly Market Its Product

This Court in *Bates* stated:

> Rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for "labeling and packaging."

Bates, slip op. at p. 11.

Consumer fraud statutes, applied to fraudulent company marketing schemes, likewise do not impose requirements as to "labeling and packaging." Rather, consumer fraud statutes, like the New Jersey Consumer Fraud Act (NJCFA), impose a duty upon global chemical companies to honestly market their product. Farmers argued, and the unanimous jury on December 6, 2001 found, that ***BASF violated its duty of honesty in the marketing of its herbicide***. Nothing about the jury verdict requires BASF to do anything other than ***honestly market its product***.

F. BASF's Complaint That The Jury Was Not Instructed On FIFRA Requirements Grossly Misrepresents The Record

The Minnesota appellate courts readily understood that this case presents *no* genuine issue of fact concerning whether BASF complied with the EPA regulatory processes. The Minnesota courts succinctly captured the heart of the dispute:

> [F]armers argue that their consumer fraud claim is not based on BASF's labels but rather on fraudulent marketing techniques. The Court of Appeals agreed. It held that "the Farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging."

Peterson III, 675 N.W.2d at 70. The ***only*** issue for the jury was whether BASF's marketing and pricing schemes violated the NJCFA. *Peterson I*, 618 N.W.2d 821, 824 (Minn. App. 2000) (BASF's focus on the EPA statutes and regulations is "*misplaced*" and there was "a genuine issue of material fact . . . as to whether BASF's *system of deceit* falls within the broad protection of the [NJCFA].").

G. BASF's Regulatory And Marketing Experts And Management Conceded At Trial That Regulatory Compliance Has No Relation To Consumer Fraud

Farmers' fraud claims were based on BASF's "marketing scheme" and were not based on "technically accurate" product labels. *Peterson II*, 657 N.W.2d at 865. During trial, BASF's regulatory and marketing experts and management conceded that the EPA and state herbicide regulatory process has no relation to whether a company deceptively and fraudulently markets and sells a product:

BASF's EPA regulatory expert – Daniel Barolo

> Q. And the same thing would be true of ***a company who went through all the process of registering a crop with both the EPA***

and states, they could still commit consumer fraud.

A. ***I presume they could.***

Tr.2493:3-5;2493:19-25;2494:1-5.

BASF's marketing expert – Dr. Dale Dahl

Q. Okay. ***So patents, consumer fraud, doesn't cover it. Registration, consumer fraud doesn't cover it. Differential pricing, consumer fraud doesn't cover it. In other words, you're not protected from committing consumer fraud.***

A. ***Right.***

Tr.3352:12-17.

BASF's management – William Wisdom

Q. And ***you will agree and tell the jury that the EPA does not concern itself with BASF's marketing practices, does it?***

A. ***That's correct.***

Q. ***But consumer fraud laws do, don't they?***

A. ***Yes, sir.***

Q. ***The EPA registration process that we have been talking about does not concern market[ing]; right?***

A. ***That's correct.***

Tr.1017:7-15.

III. THIS COURT SHOULD DENY BASF'S INJUDICIOUS PETITION

There is no basis to hold BASF's petition or remand the petition to the Minnesota Supreme Court. The EPA firmly declared to North Dakota regulatory officials upon inquiry that BASF's fraudulent "marketing" scheme was not in the EPA's purview and not preempted. The jury verdict and established facts, the Minnesota courts and common sense, unanimously declare likewise. Farmers ask this Court to promptly deny BASF's injudicious petition.[4]

Respectfully submitted,

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[4] Eleven unanimous Minnesota appellate judges in three published opinions – *Peterson III*, *II* and *I* – have studied the facts of this case as determined by the jury and unanimously rejected BASF's frivolous federal preemption defense.